

(18)
No. 95-157-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Christopher Lee Armstrong, et al.

Docketed:
July 27, 1995

Court: United States Court of Appeals for
the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Dudley, David, Lannen, Timothy C.,
O'Connor, Barbara E., Rosen, Bernard J., Walsh, Joseph
F.

Entry	Date	Note	Proceedings and Orders
1	May 17 1995	G	Application (A94-886) to extend the time to file a petition for a writ of certiorari from May 31, 1995 to June 30, 1995, submitted to Justice O'Connor.
2	May 19 1995		Application (A94-886) granted by Justice O'Connor extending the time to file until June 30, 1995.
3	Jun 20 1995	G	Application (A94-886) to extend further the time to file a petition for a writ of certiorari from June 30, 1995 to July 28, 1995, submitted to Justice O'Connor.
4	Jun 21 1995		Application (A94-886) granted by Justice O'Connor extending the time to file until July 28, 1995.
5	Jul 27 1995	G	Petition for writ of certiorari filed.
7	Aug 18 1995		Order extending time to file response to petition until September 29, 1995.
8	Aug 25 1995	G	Motion of respondent Robert Rozelle for leave to proceed in forma pauperis filed.
9	Aug 25 1995		Brief of respondent Robert Rozelle in opposition filed.
12	Sep 28 1995		Brief of respondent Shelton Auntwan Martin in opposition filed.
13	Sep 28 1995	G	Motion of respondent Shelton Auntwan Martin for leave to proceed in forma pauperis filed.
10	Sep 29 1995		Brief of respondent Aaron Hampton in opposition filed.
11	Sep 29 1995	G	Motion of respondent Aaron Hampton for leave to proceed in forma pauperis filed.
14	Oct 11 1995		DISTRIBUTED. October 27, 1995 (Page 12)
15	Oct 16 1995	X	Reply brief of petitioner filed.
17	Oct 30 1995		Motion of respondent Robert Rozelle for leave to proceed in forma pauperis GRANTED.
18	Oct 30 1995		Motion of respondent Shelton Auntwan Martin for leave to proceed in forma pauperis GRANTED.
19	Oct 30 1995		Motion of respondent Aaron Hampton for leave to proceed in forma pauperis GRANTED.
20	Oct 30 1995		Petition GRANTED. *****
21	Nov 13 1995	G	Motion of respondent Robert Rozelle for appointment of counsel filed.
22	Nov 13 1995	G	Motion of respondent Shelton Auntwan Martin for appointment of counsel filed.
23	Nov 16 1995	G	Motion of respondent Aaron Hampton for appointment of counsel filed.
24	Dec 4 1995		Motion for appointment of counsel GRANTED and it is

Entry	Date	Note	Proceedings and Orders
			ordered that Joseph F. Walsh, Esq., of Los Angeles, California, is appointed to serve as counsel for the respondent Robert Rozelle in this case.
25	Dec 4 1995		Motion for appointment of counsel GRANTED and it is ordered that Barbara E. O'Connor, Esq., of Los Angeles, California, is appointed to serve as counsel for the respondent Shelton Auntwan Martin in this case.
26	Dec 4 1995		Motion for appointment of counsel GRANTED and it is ordered that Timothy C. Lannen, Esq., of Los Angeles, California, is appointed to serve as counsel for the respondent Aaron Hampton in this case.
31	Dec 13 1995	G	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
27	Dec 14 1995		SET FOR ARGUMENT MONDAY, FEBRUARY 26, 1996. (2ND CASE).
28	Dec 14 1995		Joint appendix filed.
29	Dec 14 1995		Brief of petitioner United States filed.
46	Dec 14 1995	G	Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae filed.
30	Dec 19 1995		CIRCULATED.
33	Jan 5 1996	G	Application (A95-566) to file a merits brief in excess of page limits, submitted to Justice O'Connor.
32	Jan 8 1996		Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.
35	Jan 8 1996		(A95-566) Application (A-566) granted by Justice O'Connor for a maximum of 65 pages
37	Jan 8 1996	X	Brief of respondent Robert Rozelle in opposition filed.
38	Jan 9 1996	X	Brief of respondents Shelton Auntwan Martin, et al. filed.
44	Jan 9 1996	X	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
36	Jan 11 1996		Record filed.
		*	Original record proceedings United States District Court for the Central District of California (BOX).
42	Jan 16 1996	X	Brief amicus curiae of NAACP Legal Defense & Education Fund, Inc., et al. filed.
43	Jan 16 1996	X	Brief amici curiae of Former Law Enforcement Officials & Police Org., et et al. filed.
40	Jan 17 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
39	Jan 18 1996	D	Motion of respondent Robert Rozelle for divided argument filed.
41	Jan 22 1996		Motion of respondent Robert Rozelle for divided argument DENIED.
48	Feb 15 1996	X	Reply brief of petitioner United States filed.
47	Feb 20 1996		Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
49	Feb 26 1996		ARGUED.

95157 JUL 27 1995

No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER LEE ARMSTRONG, ET AL.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTION PRESENTED

Whether the court of appeals erred in holding that evidence that members of a particular race have been prosecuted for a particular offense is sufficient to justify an order requiring discovery from the government on a claim of selective prosecution, absent evidence that similarly situated persons of a different race have not been prosecuted for that offense.

II

PARTIES TO THE PROCEEDING

The petitioner is the United States of America. The respondents are Christopher Lee Armstrong, Robert Rozelle, Aaron Hampton, Freddie Mack, and Shelton Auntwan Martin.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Reasons for granting the petition	10
Conclusion	26
Appendix A	1a
Appendix B	68a
Appendix C	105a

TABLE OF AUTHORITIES

Cases:

<i>Attorney General v. Irish People, Inc.</i> , 684 F.2d 928 (D.C. Cir. 1982), cert. denied, 459 U.S. 1172 (1983)	16, 19, 20
<i>Basic Inc. v. Levinson</i> , 485 U.S. 224 (1988)	17
<i>Bordenkircher v. Hayes</i> , 434 U.S. 357 (1978)	12
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	12
<i>Cobbledick v. United States</i> , 309 U.S. 323 (1940)	14
<i>Department of Labor v. Triplett</i> , 494 U.S. 715 (1990) ...	18
<i>Heckler v. Chaney</i> , 470 U.S. 821 (1985)	12
<i>Imbler v. Pachtman</i> , 424 U.S. 409 (1976)	13
<i>McCleskey v. Kemp</i> , 481 U.S. 279 (1987)	18
<i>Miller v. Johnson</i> , No. 94-631 (June 29, 1995)	18
<i>Oyler v. Boles</i> , 368 U.S. 448 (1962)	12
<i>Turner v. United States</i> , 396 U.S. 398 (1970)	17
<i>United States v. Bourgeois</i> , 964 F.2d 935 (9th Cir.), cert. denied, 113 S. Ct. 290 (1992)	7, 17, 21, 22
<i>United States v. Chemical Foundation, Inc.</i> , 272 U.S. 1 (1926)	16
<i>United States v. Cooks</i> , 52 F.3d 101 (5th Cir. 1995)	19
<i>United States v. Fares</i> , 978 F.2d 52 (2d Cir. 1992)	20
<i>United States v. Greenwood</i> , 796 F.2d 49 (4th Cir. 1986)	20
<i>United States v. Henry</i> , No. CR 94-628-CBM (C.D. Cal. June 26, 1995)	22, 23

Cases—Continued:

Page

<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	12
<i>United States v. Parham</i> , 16 F.3d 844 (8th Cir. 1994) .	20
<i>United States v. Peete</i> , 919 F.2d 1168 (6th Cir. 1990) ...	20
<i>United States v. Rendon-Abundez</i> , No. 94-50352 (9th Cir. July 13, 1995)	24
<i>Village of Arlington Heights v. Metropolitan Housing Dev. Corp.</i> , 429 U.S. 252 (1977)	18
<i>Wade v. United States</i> , 504 U.S. 181 (1992)	14
<i>Wayte v. United States</i> , 470 U.S. 598 (1985)	11, 12, 13
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886)	13, 18
Constitution and statutes:	
U.S. Const. Art. II, § 3	12
8 U.S.C. 1326	23
18 U.S.C. 924(c)	2
21 U.S.C. 841	3, 4
21 U.S.C. 841(a)(1)	2
21 U.S.C. 846	2, 3, 4
Miscellaneous:	
United States Sentencing Comm'n, <i>Annual Report</i> 1994	23, 25

In the Supreme Court of the United States

OCTOBER TERM, 1995

No.

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER LEE ARMSTRONG, ET AL.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-67a) is reported at 48 F.3d 1508. The panel opinion of the court of appeals (App., *infra*, 68a-104a) is reported at 21 F.3d 1431.

JURISDICTION

The judgment of the en banc court of appeals was entered on March 2, 1995. By order dated June 21, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and

including July 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1992, respondents Christopher Lee Armstrong, Robert Rozelle, Aaron Hampton, Freddie Mack, and Shelton Auntwan Martin were indicted in the United States District Court for the Central District of California on charges of conspiring to possess with intent to distribute, and conspiring to distribute, more than 50 grams of cocaine base (crack), in violation of 21 U.S.C. 846. Respondents were also variously charged in four counts with distributing crack, in violation of 21 U.S.C. 841(a)(1), in one count with possessing crack with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and in three counts with using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c). App., *infra*, 4a.

Respondents, each of whom is black, alleged that the United States Attorney's Office had determined to prosecute them because of their race. They sought discovery from the government to obtain information that they asserted would support that claim. The district court granted the motion for discovery. It also adhered to that ruling in denying the government's motion for reconsideration. When the government indicated that it would not comply with the discovery order, the district court dismissed the indictment. A divided panel of the court of appeals reversed, concluding that the district court had abused its discretion in ordering discovery. On rehearing en banc, the court of appeals, by a 7-4 vote, held that the district court had permissibly ordered discovery. It

therefore affirmed the district court's dismissal of the indictment.

1. In support of their motion for discovery, respondents offered only one item of evidentiary support for their claim of selective prosecution: an affidavit from a paralegal employed by the Federal Public Defender for the Central District of California. App, *infra*, 5a, 71a. The affidavit stated that, based on a review of all cases closed by the Federal Public Defender's Office during 1991 that involved substantive drug offenses or drug conspiracy offenses in violation of 21 U.S.C. 841 and 846, all of the 24 defendants charged with a crack offense were black. App., *infra*, 5a. The government opposed respondents' motion for discovery, arguing that respondents had failed to establish a sufficient threshold showing of selective prosecution to justify an order compelling discovery. *Id.* at 71a.

The district court found that respondents' showing was sufficient to justify discovery. The court stated that the number of cases and the time period covered by the affidavit, the comparable charges involved in each case, and the fact that all the defendants were of the same race required an explanation. The court ordered the government: (1) to provide a list of all cases from the prior three years in which the government charged both crack and firearms offenses; (2) to identify the race of the defendant in each case; (3) to state whether each case was investigated by federal or state law enforcement authorities or by a joint federal and state effort; and (4) to explain the criteria used by the United States Attorney's Office in deciding whether to bring crack charges in federal court. App., *infra*, 5a.

The government moved for reconsideration of the court's discovery order. In support of its motion, the government provided evidence, based on an informal survey of Assistant United States Attorneys in the Central District of California, that at least 11 non-black defendants had been indicted on crack charges during the period covered by respondents' affidavit. C.A. Excerpts of Record (E.R.) 32-33, 123-124. Four of those 11 were represented by the Federal Public Defender. *Id.* at 32-33. The government also submitted computerized records showing that from 1989 to 1992 approximately 2,400 defendants had been charged with drug offenses under 21 U.S.C. 841 and approximately 1,700 defendants had been charged with drug conspiracy offenses under 21 U.S.C. 846. E.R. 75-85.

In addition, the government submitted affidavits from the two officers who had investigated this case. Those affidavits stated that race had played no role in the investigation and that the case had been referred for federal prosecution because it involved provable crack and firearms offenses that met the United States Attorney's guidelines for federal prosecution. E.R. 24-28. The government also submitted the affidavit of the then-Chief of the Criminal Complaints Section of the United States Attorney's Office, who explained that "[a]ll charging decisions are made on the basis of whether a federal offense that meets this Office's guidelines has occurred, the overall strength of the evidence, the deterrence value and federal interest associated with the particular case, the criminal history of the suspects, and other race-neutral criteria." *Id.* at 29. He further stated that this case met the general criteria because: it involved more than 100 grams of crack, which was in excess of

twice the amount necessary for a ten-year mandatory minimum sentence; the case involved multiple sales and multiple defendants, indicating a fairly substantial crack ring; the case was jointly investigated by federal and state agencies; firearms were used in connection with the drug trafficking; the evidence against respondents was strong, including audio and video tapes of the respondents' illegal activities; respondent Armstrong had made threats against the arresting officers; and several of the respondents had committed prior narcotics and firearms violations. *Id.* at 30.

Finally, the government submitted an affidavit from the Public Information Officer for the Los Angeles Division of the Drug Enforcement Administration (DEA) and a DEA report on crack. The affidavit stated that, for cultural and historical reasons, particular racial and ethnic groups tend to dominate the distribution of particular drugs. In the officer's experience, black street gangs dominate the distribution of crack in the Los Angeles area. E.R. 20-23. The DEA report, "Crack Cocaine Overview 1989," detailed the sociological patterns of crack use and distribution in this country. *Id.* at 35-62. It concluded that Jamaicans, Haitians, and black street gangs dominate the large-scale manufacture and distribution of crack nationwide. *Id.* at 50.

In response, respondents offered an affidavit from one of respondents' defense attorneys stating that she had spoken to an intake coordinator at a drug treatment center in Pasadena, California, who told her that, based on his experience, there are "an equal number of caucasian users and dealers to minority users and dealers." E.R. 85B. A second defense attorney asserted in a declaration that, based on his

discussions with judges, prosecutors, and defense attorneys, many non-blacks are prosecuted in state court for crack offenses. *Id.* at 85D-85E. Finally, respondents offered a newspaper article that stated that the federal penalty for crack offenses is higher than the penalty for powder cocaine offenses and that most federal defendants in crack cases nationwide are black. App., *infra*, 6a-7a, 33a.

The district court denied the government's motion for reconsideration, stating:

The statistical data provided by [respondents] raises a question about the motivation of the Government which could be satisfied by the government disclosing its criteria, if there is any criteria, for bringing this case and others like it in Federal court. Without this criteria the statistical data is evidence and does suggest that the decisions to prosecute in Federal court could be motivated by race.

App., *infra*, 7a. After the government indicated that it would not comply with the court's discovery order, the district court dismissed the indictment. *Ibid.*

2. A divided panel of the court of appeals reversed. App., *infra*, 68a-104a. The panel held that, to justify discovery on a claim of selective prosecution, a criminal defendant must demonstrate a "colorable basis for believing that 'others similarly situated have not been prosecuted.'" *Id.* at 80a. The panel determined that respondents' affidavit failed to satisfy that test because it showed only that "others *have* been prosecuted, not that others similarly situated have not." *Ibid.* Without a colorable basis for believing that others similarly situated have not been prosecuted, the panel stated, "the most reasonable

conclusion is that the defendant was selected for prosecution because the government believed the defendant committed the offense; the fact that the defendant is a member of a protected class is coincidental." *Id.* at 80a.

Judge Reinhardt dissented. In his view, a court "must assume * * * that people of *all* races commit *all* types of crimes." App., *infra*, 96a. For that reason, Judge Reinhardt concluded that, "[w]here a defendant shows a reasonable statistical basis for the inference that all defendants charged with a particular federal crime over a significant period of time were members of a single race, such a showing creates, ipso facto, a colorable basis for believing that similarly situated members of other races were not prosecuted." *Id.* at 96a-97a.

3. The court of appeals granted rehearing en banc to resolve a conflict in its cases over the standards governing discovery when a defendant claims selective prosecution. By a 7-4 vote, the court held that the district court had not abused its discretion in ordering discovery in this case. App., *infra*, 1a-67a.

The majority first held that a district court has discretion to order discovery on a claim of selective prosecution when "the evidence provides a colorable basis for believing that discriminatory prosecutorial selections have occurred." App., *infra*, 8a. Rejecting the view expressed in *United States v. Bourgeois*, 964 F.2d 935, 940 (9th Cir.), cert. denied, 113 S. Ct. 290 (1992), that discovery should be ordered only in the rare case, the en banc court held that the applicable standard does not establish a "high threshold." App., *infra*, 9a. Instead, it requires defendants to produce "some evidence tending to show the essential elements of the claim," a standard that is met when the

evidence is "more than frivolous and based on more than conclusory allegations," and when defendants "make good faith efforts to obtain whatever evidence is readily available, as well as to provide whatever evidence is already in their possession." *Id.* at 8a, 12a. Because the court believed that proving a case of selective prosecution is difficult and that the information necessary to support such a claim may be in the government's exclusive possession, the court concluded that a more substantial threshold showing should not be required. *Id.* at 11a-12a. The court also held that statistical disparities alone can establish a prima facie case of race-based selective prosecution. *Id.* at 10a & n.1. Because the standard for obtaining discovery should be lower than that required for a prima facie case, the court concluded that "inadequately explained evidence of a significant statistical disparity in the race of those prosecuted suffices to show the colorable basis of discriminatory intent and effect that warrants discovery on a selective prosecution claim." *Id.* at 11a.

Applying those standards, the court held that respondents' identification of 24 black crack defendants was sufficient to warrant discovery. The court stated that, although "such a small number of cases does not conclusively establish either of the elements of selective prosecution * * *, the fact that every single crack defendant represented by the Federal Public Defender in all cases that terminated during 1991 was black provides a colorable basis for believing that the challenged prosecutorial policies are driven by discriminatory motives and yield discriminatory effects." App., *infra*, 16a. The government argued that respondents' affidavit failed to establish a disparity and was inadequate to justify

discovery because it "shows only that blacks have been prosecuted, not that others of different races and similarly situated have not." *Id.* at 18a. The court concluded, however, that "[w]e must start with the presumption that people of all races commit all types of crimes." *Id.* at 19a. Otherwise, the court said, "we would be accepting unwarranted racial stereotypes." *Id.* at 19a n.6. The court therefore inferred a showing of racial disparity sufficient to warrant discovery. The court also rejected the government's contention that no evidence of discriminatory purpose had been presented, expressing the view that an unexplained race-based disparity is sufficient evidence of discriminatory intent to justify discovery. *Id.* at 25a.

Chief Judge Wallace concurred in the judgment. App., *infra*, 28a-31a. He rejected the majority's holding that the discovery threshold in a selective prosecution case should not be "high." In his view, "a high threshold 'is appropriate because courts are ill equipped to assess a prosecutor's charging decisions, and oversight of prosecutorial decisions could undermine effective law enforcement.'" *Id.* at 29a. Nevertheless, he concurred in the result in this case because of his view that an appellate court should not overturn a district court's discovery order absent a clear error in judgment. *Id.* at 29a, 31a.

Judge Rymer, joined by Judges Leavy, T.G. Nelson, and Kleinfeld, dissented. App., *infra*, 32a-67a. Judge Rymer summarized her disagreement with the majority as follows:

For the first time in this circuit or any other, the en banc court has held that a raw number of prosecutions, without reference to a comparison group and without evidence that others, similarly

situated except for their race, have not been prosecuted, provides a colorable basis for the existence of both discriminatory effect and discriminatory intent sufficient to order discovery from the government in connection with a criminal defendant's selective prosecution defense. Also, though both the Supreme Court and this circuit have made clear that discriminatory effect and discriminatory intent are two different elements, each of which must exist, the majority's opinion effectively collapses intent into effect by holding that both may be shown by the same, insubstantial statistic. Additionally the opinion has formally removed the "high threshold" that, until now, we explicitly (and other circuits implicitly) have required to be met before discovery relating to a selective prosecution claim can be ordered. In so doing, the majority opinion radically, and unnecessarily, rewrites the law of selective prosecution.

Id. at 32a. Judge Rymer concluded that, in view of the majority's relaxed standard for ordering discovery, government resources that would better be spent on prosecuting crime will instead be devoted to "chasing statistics." *Id.* at 67a.

REASONS FOR GRANTING THE PETITION

The court of appeals has held that trial courts may order discovery on a claim of selective prosecution based solely on evidence that persons of a particular race have been prosecuted for a particular offense, without any evidence that similarly situated persons of a different race have not been prosecuted. The court has further held that the same showing can establish a *prima facie* case of selective prosecution.

Those holdings fundamentally change the legal principles that have governed selective prosecution claims until now and threaten to have a substantial impact on the prompt and effective enforcement of the criminal law. In particular, by eliminating the requirement that criminal defendants show that others who are similarly situated have not been prosecuted in order to obtain discovery on a claim of selective prosecution, the decision below will cause the diversion of government resources from prosecuting criminal cases to responding to motions, with the necessary effect of impeding prosecutions and delaying trials on the merits.

The court of appeals' decision violates principles established in this Court's cases that sharply limit judicial inquiry into exercises of prosecutorial discretion. It conflicts with decisions from numerous courts of appeals that have required defendants to make a threshold showing that similarly situated persons have not been prosecuted before discovery may be ordered on a claim of selective prosecution. It invites federal district courts to subject routine exercises of prosecutorial discretion to intrusive inquiries in a wide range of cases. And it threatens to impose serious costs on the administration of criminal justice. Review by this Court is therefore warranted.

1. In *Wayte v. United States*, 470 U.S. 598, 608 (1985), this Court held that claims of selective prosecution must be evaluated according to "ordinary equal protection standards." Accordingly, to prevail on a claim of selective prosecution, a criminal defendant must show that the enforcement of a criminal statute "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Ibid.*

To establish a discriminatory effect, a criminal defendant must show that others who are similarly situated, except for the protected characteristic, have not been prosecuted. See *id.* at 609-610.

In view of the Court's recognition of the limited role of judicial review over exercises of prosecutorial discretion, the court of appeals seriously erred in permitting discovery to proceed based solely on evidence that persons of a particular race had been prosecuted, without requiring any evidence that similarly situated persons of a different race had not been prosecuted. Except in a case involving direct admissions by officials of a discriminatory purpose, a showing by the defendant that similarly situated persons of another race were not prosecuted is essential to justify a discovery order on a claim of selective prosecution.

The exercise of prosecutorial discretion is a core element of the Executive's power to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam); *United States v. Nixon*, 418 U.S. 683, 693 (1974). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). A prosecutor may not bring charges based on unconstitutional criteria. *Oyler v. Boles*, 368 U.S. 448, 456 (1962). "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, * * * the denial of equal justice is

still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886). Judicial inquiry into the prosecutor's motive must be reserved, however, for the rare case in which there is a substantial and concrete basis for suspecting unconstitutional action in order to avoid encroachment into an area that the Constitution reserves to the Executive Branch.

Exceptional caution in this regard is also appropriate because "the decision to prosecute is particularly ill-suited to judicial review." *Wayte*, 470 U.S. at 607. The factors that the government must consider in deciding to prosecute, such as the strength of the case, the general deterrence value, and the government's enforcement priorities, "are not readily susceptible to the kind of analysis the courts are competent to undertake." *Ibid.* And judicial review of prosecutorial decisionmaking "threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Ibid.*

Finally, to subject a prosecutor's motives to judicial scrutiny at the behest of a defendant imposes high costs on the criminal justice system. Criminal defendants "often will transform [their] resentment at being prosecuted into the ascription of improper and malicious actions to the [government's] advocate." *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976). Absent threshold screening to prevent abuses, defendants would be able to employ claims of selective prosecution and associated discovery demands as powerful tools to delay the resolution of the charges against them. The purpose of a criminal proceeding is to determine a defendant's guilt or innocence, and

"encouragement of delay" in resolving that central issue "is fatal to the vindication of the criminal law." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

In light of those principles, it is essential that a defendant make a substantial threshold showing before obtaining discovery on a claim that a prosecutor has abused his broad discretion by relying on discriminatory criteria. In *Wade v. United States*, 504 U.S. 181 (1992), for example, the Court considered whether a court may review a claim that the government unconstitutionally refused to file a motion for a departure from a mandatory minimum (or Guidelines) sentence based on the defendant's substantial assistance, and, if so, what showing a criminal defendant must make to obtain discovery to support his claim. The Court noted the defendant's concession that, in order to obtain discovery, the defendant was required to make a "substantial threshold showing" of an unconstitutional motive. *Id.* at 186. The Court then held that, because the defendant had failed to make such a showing, discovery was properly denied. *Id.* at 186-187. In *Wade*, as here, the requirement of a substantial threshold showing properly balances the interest of courts in protecting the equal protection rights of individuals with the necessary judicial hesitance to explore the motives of prosecutors in bringing a criminal case.

2. The court of appeals in this case departed from the established legal standards for evaluating claims of selective prosecution and thereby adopted an incorrect legal test for granting discovery on such a claim. Respondents produced evidence that all of the 24 crack prosecutions closed by the Federal Public Defender in 1991 involved black defendants. The en banc court held that such evidence was sufficient to

support a discovery order. But as the panel in this case explained, respondents' evidence "demonstrates only that others *have* been prosecuted, not that others similarly situated have not." App., *infra*, 80a. The showing therefore contains "a total lack of evidence" (*ibid.*) on one essential element of a selective prosecution claim: the disparate treatment of offenders who are similarly situated but for their race.

The court of appeals recognized that there was no factual showing in this case that the government had failed to prosecute similarly situated persons of a different race. The court held, however, that such evidence is unnecessary because of a legal presumption "that people of all races commit all types of crimes." App., *infra*, 19a & n.6. According to the court, a criminal defendant can rely on that presumption, unless the government introduces "compelling contrary evidence." *Id.* at 19a. Thus, under the court of appeals' analysis, evidence that members of a particular race have been prosecuted is in itself sufficient to warrant substantial discovery, or a significant factual response from the government analyzing the pool of persons who have committed the crimes at issue.

None of the reasons suggested by the court of appeals justifies its new rule dispensing with an essential element of a claim of selective prosecution. The court stated that "[t]he fact that evidence of similarly situated persons who were not prosecuted was submitted in other kinds of selective prosecution claims is of no significance in the context of a selective prosecution case based on race" because, in the court's view, imposing such a requirement in relation to race-based claims "would be accepting

unwarranted racial stereotypes." App., *infra*, 19a n.6. As the dissent in this case stated, however, the "need to identify similarly situated persons who have not been prosecuted does not evaporate when race is advanced as the constitutionally impermissible factor." *Id.* at 63a.

Reliance on a presumption, rather than concrete evidence, to permit the defendant to make a threshold showing of a discriminatory effect runs counter to the settled rule that, "in the context of a criminal prosecution, the Government enjoys a presumption of having undertaken [the action] in good faith and in nondiscriminatory fashion." *Attorney General v. Irish People, Inc.*, 684 F.2d 928, 947 (D.C. Cir. 1982) (internal quotation marks omitted), cert. denied, 459 U.S. 1172 (1983). "[I]n the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). To overcome that presumption of prosecutorial good faith, the defendant must adduce facts, not assumptions.

Nothing in a claim of race-based selective prosecution requires a different result. Insisting upon evidence that other similarly situated offenders of another racial group have not been prosecuted does not accept racial stereotypes. Rather, it recognizes the empirical possibility that, for socio-economic and historical reasons, members of particular racial and ethnic groups may predominate in the commission of certain crimes. Indeed, the government presented affirmative evidence in this case supporting the conclusion that black individuals dominate large-scale dealing in crack. See App., *infra*, 22a; see *id.* at 72a-73a (panel opinion). The court of appeals, in the

interest of avoiding what it characterized as racial stereotypes, was not free to adopt an evidentiary presumption that has neither a rational nor a factual foundation. Cf. *Basic Inc. v. Levinson*, 485 U.S. 224, 245-246 (1988); *Turner v. United States*, 396 U.S. 398, 404-405 (1970).

The requirement that defendants produce evidence of similarly situated persons who have not been prosecuted is necessary to "discourage fishing expeditions, protect legitimate prosecutorial discretion, [and] safeguard government investigative records." *Bourgeois*, 964 F.2d at 940. At the same time, however, that requirement "still allow[s] meritorious claims to proceed." *Ibid.* In those rare instances in which a claim of selective prosecution has merit, it should not be difficult for a criminal defendant to make the necessary threshold showing. As the cases that have authorized discovery demonstrate, evidence concerning similarly situated offenders is not in the government's exclusive possession. See App., *infra*, 61a n.16 (discussing cases in which defendants introduced evidence that similarly situated persons had not been prosecuted). The present case illustrates that as well. If there were any substance to respondents' claim, they would have had no difficulty producing concrete evidence that similarly situated persons of a different race were being prosecuted by the State of California. Respondents, however, failed to introduce such evidence.¹

¹ In ordering discovery in this case, the district court did not rely on the affidavits submitted by counsel for respondents in response to the government's motion for reconsideration, E.R. 184, and the court of appeals made clear that respondents' 24-defendant showing alone was sufficient to support its discovery

The court of appeals did not confine its reformulation of legal principles to the discovery stage. It also held that a *prima facie* case of selective prosecution could be established without evidence that similarly situated persons of a different race have not been prosecuted. App., *infra*, 10a & n.1. That holding profoundly unsettles the law. Where, as here, "the discretion that is fundamental to our criminal process is involved," *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987), statistical evidence is accepted as proof of intentional discrimination only when there is a disparity between the racial composition of the group selected and the racial composition of the group eligible for selection that is so "stark" as to be "unexplainable" on any ground other than race. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977); *McCleskey*, 481 U.S. at 293-294 & n.12; *Yick Wo*, 118 U.S. at 373; see *Miller v. Johnson*, No. 94-631 (June 29, 1995), slip op. 12. Such proof necessarily entails a showing that similarly situated persons of a different race have not been prosecuted. Absent such a showing, the evidence fails to cast any doubt on the most obvious race-neutral explanation for the prosecutions brought: that the pool of persons prosecuted mirrors the pool of similarly situated offenders.

order, without regard to the affidavits. App., *infra*, 17a. Even if those supplemental affidavits were considered, however, they contain only vague, conclusory, and impressionistic hearsay. Not only do they fail to provide solid and credible evidence, cf. *Department of Labor v. Triplett*, 494 U.S. 715, 724-725 (1990), but they do not show that similarly situated persons of a different race had not been prosecuted.

3. The court of appeals' decision conflicts with decisions from numerous other circuits. Although the courts of appeals have phrased the standard for obtaining discovery in different ways, the circuits that have squarely addressed the issue have all held that, before obtaining discovery, a defendant must make a threshold showing that others similarly situated have not been prosecuted.

For example, in *United States v. Cooks*, 52 F.3d 101, 105 (5th Cir. 1995), a defendant prosecuted for conspiring to distribute more than 50 grams of crack sought discovery on a claim that blacks were selectively prosecuted in federal rather than state court. In support of that request, the defendant introduced statistical evidence that the overwhelming majority of those arrested for possession of crack are black and that such arrests have increased tenfold in recent years. *Ibid.* The Fifth Circuit held that discovery was properly denied because the statistical evidence "fail[ed] to satisfy the first prong of the selective prosecution inquiry; it [did] not establish that white defendants committing this offense were prosecuted in state rather than federal court." *Ibid.*

In *Attorney General v. Irish People, Inc.*, the D.C. Circuit similarly held that, in order to obtain discovery from the government on a claim of selective prosecution, a defendant must not only introduce evidence of improper motive, but must also "make a colorable showing that he has been especially singled out, that there exist persons similarly situated who have not been prosecuted." 684 F.2d at 946. As the court explained, "[d]iscrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances." *Id.* at 945. The court expressly held that evidence that there are

unprosecuted similarly situated offenders is essential not only to prove a claim of selective prosecution, but also to obtain discovery on such a claim. The court stated that "we can see no reason for throwing out half the standard on the discovery issue. If either part of the test is failed, the defense fails; thus it makes sense to require a colorable claim of both before subjecting the Government to discovery." *Id.* at 947.

The Second, Fourth, Sixth, and Eighth Circuits have also held that, in order to obtain discovery, a defendant must make a threshold showing that others similarly situated have not been prosecuted. *United States v. Fares*, 978 F.2d 52, 59-60 (2d Cir. 1992) (discovery properly denied because defendant did not introduce evidence that there were "large numbers of similarly situated persons known to the government who had not been prosecuted"); *United States v. Greenwood*, 796 F.2d 49, 52-53 (4th Cir. 1986) (discovery properly denied because defendant failed to make non-frivolous showing that others who were similarly situated had not been prosecuted); *United States v. Peete*, 919 F.2d 1168, 1176 (6th Cir. 1990) (discovery properly denied because defendant, "aside from his own self-serving affidavit and an affidavit from his counsel, did not point to any evidence that others similarly situated were not prosecuted"); *United States v. Parham*, 16 F.3d 844, 847 (8th Cir. 1994) (discovery properly denied because, "[w]here a defendant cannot show anyone in a similar situation who was not prosecuted, he has not met the threshold point of showing that there has been selectivity in prosecution").

Indeed, even the Ninth Circuit had, before the decision in this case, correctly required defendants

seeking discovery from the government to introduce "solid, credible" evidence that other similarly situated offenders had not been prosecuted in order to obtain discovery on a claim of selective prosecution. *Bourgeois*, 964 F.2d at 939. In light of the Ninth Circuit's abandonment of that principle, review is warranted to resolve the conflict in the circuits created by the decision in this case.

4. The holding in this case has a substantial adverse impact on the administration of criminal cases in the Ninth Circuit. Because defendants have a large incentive to put up threshold procedural roadblocks that postpone a criminal trial, the decision in this case has spawned, and will continue to spawn, numerous motions arguing that particular exercises of prosecutorial discretion are tainted by discriminatory motives, and that significant discovery into the prosecutors' files is warranted. Responding to those motions entails disruption, delay, and burden, all of which come at the expense of the investigation and prosecution of crime. Racial discrimination in the administration of the law is intolerable and unconstitutional, and the United States' policy is that the enforcement of the criminal law must be free from invidious discrimination. Although courts have a duty to enforce equal protection guarantees in the face of a properly supported claim of selective prosecution, the Ninth Circuit's novel approach goes far beyond what is necessary or appropriate for that purpose.

Until now, there have been only a handful of circuit court decisions authorizing discovery on a claim of selective prosecution. App., *infra*, 61a n.16 (discussing cases). As a prior Ninth Circuit decision explained, because of the high threshold showing re-

quired by the courts, it was the "rare defendant" who was able to present a "sufficiently strong case of selective prosecution to merit discovery of government documents." *Bourgeois*, 964 F.2d at 939. The decision below establishes a new regime in which intrusive judicial inquiries into exercises of prosecutorial discretion and substantial delays in determining a defendant's innocence or guilt could easily become routine in a wide range of cases.

For example, the showing that was made below could be made by every single black criminal defendant charged with dealing in crack in the Central District of California. The decision below thus immediately places the entire crack enforcement program for that District under a cloud. As a practical matter, the Central District United States Attorney's Office must be prepared to justify its exercise of prosecutorial discretion to a federal district judge each time it prosecutes a black defendant for dealing in crack. Numerous discovery motions have been filed in the Central District of California,² and the effort to respond to those

² Selective prosecution discovery motions have been filed in the following crack cases. *United States v. Henry*, No. CR 94-628-CBM (C.D. Cal.); *United States v. Turner*, No. CR 94-649-JSL (C.D. Cal.); *United States v. Jones*, No. CR 94-820-JSL (C.D. Cal.); *United States v. Brown*, No. CR 94-821-DWW (C.D. Cal.); *United States v. Featherstone*, No. CR 94-822-SVW (C.D. Cal.); *United States v. Tyree*, No. CR 94-823-DT (C.D. Cal.); *United States v. Banks*, No. CR 94-906-JSL (C.D. Cal.); *United States v. Brown*, No. CR 95-431-HLH (C.D. Cal.); *United States v. Sanders*, No. CR 95-433-HLH (C.D. Cal.).

motions has required the expenditure of significant resources.³

Moreover, the decision below is likely to have a similar effect on United States Attorney's Offices throughout the Ninth Circuit. According to the most recent figures compiled by the United States Sentencing Commission, for the year beginning October 1, 1993, and ending September 30, 1994, more than 90% of those sentenced for dealing in crack nationwide were black. United States Sentencing Comm'n, *Annual Report 1994*, at 107 (Table 45). It is therefore reasonable to expect that the Public Defender in almost every Ninth Circuit district could make a showing that would justify discovery under the decision below.

Nor are the effects of the decision limited to crack prosecutions. Because of the proximity of California to Mexico and other Spanish-speaking countries, Hispanic defendants prosecuted in California for illegal reentry following deportation, in violation of 8 U.S.C. 1326, have been able to show that most such defendants are Hispanic—a showing that may well, under the court's en banc decision, support discovery

³ In one case, more than 1,000 hours of work by attorneys, support personnel, and law enforcement officers were required to collect data and prepare affidavits to respond to a discovery motion. The prosecution of the case was delayed by more than four months by consideration of the discovery motion, before it was ultimately denied. See *United States v. Henry*, No. CR 94-628-CBM (C.D. Cal. June 26, 1995) (Order). The opposition filed in *Henry* formed the basis for equally substantial responses filed in several other crack cases. *United States v. Turner*, No. CR 94-649-JSL (C.D. Cal.); *United States v. Jones, et al.*, No. CR 94-820-JSL (C.D. Cal.); *United States v. Banks*, No. CR 94-906-JSL (C.D. Cal.).

on claims that the government has engaged in selective prosecution in enforcing United States immigration laws. Indeed, based on such slender showings, discovery has been ordered in numerous illegal reentry cases, requiring the government to produce the criminal history record, prior deportation status, and place of origin for all defendants prosecuted for illegal reentry since 1991 in the entire Ninth Circuit.⁴ The decision in this case will exacerbate the burdens imposed by such motions.

⁴ *United States v. Fernandez-Pardo*, No. CR 94-146-DT (C.D. Cal.), remanded for reconsideration in light of *Armstrong*, No. 94-50401 (July 19, 1995); *United States v. Zapeda-Castro*, No. CR 94-399-DT (C.D. Cal.), remanded for reconsideration in light of *Armstrong*, No. 94-50402 (July 19, 1995); *United States v. Gomez-Lopez*, No. CR 94-639-RMT (C.D. Cal.), appeal pending, No. 94-50548; *United States v. Cortez-Lopez*, No. CR 94-531-DT (C.D. Cal.), appeal pending, No. 94-50553; *United States v. Hernandez-Rosas*, No. CR 94-674-DT (C.D. Cal.), appeal pending, No. 94-50592; *United States v. Flores-Huizar*, No. CR 95-101-TJH (C.D. Cal.), appeal pending, No. 95-50299; *United States v. Arenas-Tosqueto*, CR 95-380-DT (C.D. Cal.); *United States v. Contreras-Juarez*, CR 95-383-RMT (C.D. Cal.).

Moreover, in a published order, the Ninth Circuit recently remanded for reconsideration in light of *Armstrong* a Section 1326 case in which discovery was denied by the district court. *United States v. Rendon-Abundez*, No. 94-50352 (July 13, 1995), slip op. 8319, 8320 (application for stay of mandate pending). Since then, the Ninth Circuit, in unpublished orders, has remanded 17 other cases for reconsideration in light of *Armstrong*. *United States v. Gutierrez-Salas*, No. 94-50411 (July 18, 1995); *United States v. Altamirano*, No. 94-50469 (July 18, 1995); *United States v. Ibarra-Madero*, No. 94-50598 (July 18, 1995); *United States v. Mendoza-Villalobos*, No. 94-50566 (July 18, 1995); *United States v. Campos-Oropeza*, No. 94-50595 (July 18, 1995); *United States v. Chavez-Flores*, No.

Discovery requests in other classes of cases are not far behind. According to the Sentencing Commission, for the year beginning October 1, 1993, and ending September 30, 1994, 93.4% of the defendants sentenced for trafficking in LSD, 100% of those sentenced for antitrust violations, and 91.4% of those sentenced for pornography and prostitution offenses were white. *Annual Report, supra*, at 41, 107 (Tables 13, 45). In many offense categories, more than 90% of those sentenced were men. *Id.* at 41 (Table 13). In all of those cases, the defendants will be able to show that members of a group to which they belong have been

94-50612 (July 20, 1995); *United States v. Fernandez-Pardo*, No. 94-50401 (July 19, 1995); *United States v. Gonzalez-Ruiz*, No. 94-50408 (July 20, 1995); *United States v. Guerra-Ramos*, No. 94-50237 (July 19, 1995); *United States v. Gutierrez-Hernandez*, No. 94-50555 (July 19, 1995); *United States v. Hermosillo-Rodriguez*, No. 94-50501 (July 20, 1995); *United States v. Hernandez-Azamar*, No. 94-50605 (July 20, 1995); *United States v. Lua-Chavez*, No. 94-50528 (July 19, 1995); *United States v. Martinez-Sanchez*, No. 94-50466 (July 19, 1995); *United States v. Sanchez-Portillo*, No. 94-50257 (July 19, 1995); *United States v. Torres-Herrera*, No. 94-50233 (July 19, 1995); *United States v. Zapeda-Castro*, No. 94-50402 (July 19, 1995). In view of those latter dispositions, it seems likely that the Ninth Circuit will eventually remand for reconsideration all Section 1326 cases in which district courts ruled on discovery motions before the issuance of the en banc opinion in *Armstrong*. There are at least eight such cases pending in the Ninth Circuit from the Central District of California alone. *United States v. Pedraza-Murillo*, No. 94-50560; *United States v. Lemus-Garcia*, No. 95-50064; *United States v. Melgar-Galvez*, No. 95-50087; *United States v. Valenzuela-Cervantes*, No. 95-50117; *United States v. Gomez-Lopez*, No. 94-50548; *United States v. Cortez-Lopez*, No. 94-50553; *United States v. Hernandez-Rosas*, No. 94-50592; *United States v. Flores-Huizar*, No. 95-50299.

prosecuted. Even without a showing that similarly situated members of another group were not prosecuted, the Ninth Circuit's ruling may well authorize the provision of substantial discovery.

The danger in allowing discovery based on the kind of insubstantial showing made here is evident. "If more than this quantum of evidence is not required, district courts too often and unnecessarily could become immersed in the workings of a coordinate branch of government, to the benefit of neither." App., *infra*, 84a (panel opinion). And as the dissent in this case added, if the decision below remains the law, "[r]esources intended for controlling crime, one of the nation's most pressing concerns, will be chasing statistics instead." *Id.* at 67a. Because those serious harms to the criminal justice system are unjustified by any legitimate interest, this Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 93-50031, 93-50057

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

CHRISTOPHER LEE ARMSTRONG,
AKA: CHRIS ARMSTRONG, DEFENDANT
and

ROBERT ROZELLE, AARON HAMPTON;
FREDDIE MACK; SHELTON AUNTWAN MARTIN,
DEFENDANTS-APPELLEES

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

CHRISTOPHER LEE ARMSTRONG,
AKA: CHRIS ARMSTRONG, DEFENDANT-APPELLEE

Appeal from the United States District Court for the
Central District of California

[Filed Mar. 2, 1995]

(1a)

Before: WALLACE, Chief Judge, BROWNING, SCHROEDER, FLETCHER, D.W. NELSON, CANBY, REINHARDT, LEAVY, RYMER, T.G. NELSON, and KLEINFELD, Circuit Judges.

Opinion by Judge REINHARDT; Concurrence by Judge WALLACE; Dissent by Judge RYMER.

REINHARDT, CIRCUIT JUDGE:

We review this case en banc to resolve a conflict in our circuit over the proper standard for determining whether an adequate showing has been made by a defendant seeking discovery in connection with a selective prosecution charge. The conflict arises from two cases filed within days of each other that adopted different approaches to this question. *United States v. Redondo-Lemos*, 955 F.2d 1296, 1302 (9th Cir.1992), held that the government could be ordered to provide discovery only upon a "prima facie showing that wrongful discrimination is probably taking place." By contrast, *United States v. Bourgeois*, 964 F.2d 935, 939 (9th Cir.1992), stated that a prima facie showing was not necessary. Instead, *Bourgeois* adopted a "colorable basis" test. *Id.* We conclude that the colorable basis standard better accommodates the competing concerns implicated by discovery in selective prosecution cases.

We have jurisdiction to hear the government's appeal only because the district judge ordered dismissal of the defendants' indictments. 18 U.S.C. § 3731. Under 18 U.S.C. § 3731, the government is not permitted to appeal the discovery ruling itself. The statute does, however, permit the government to appeal the dismissal of indictments. Here, the district judge imposed dismissal as a sanction for the government's failure to comply with her discovery

order. That action resulted in an appealable order under § 3731.

The government does not question the reasonableness of the particular sanction imposed. In fact, it was the government itself that suggested dismissal of the indictments to the district court so that an appeal might lie. On appeal, the government argues only that no sanction at all should have been ordered, contending that the district judge abused her discretion in requiring discovery. As a result, the appeal allows us to reach the merits of the underlying discovery issue.

The district judge stayed execution of the dismissal order pending the outcome of this appeal. It appears from the record that she issued the stay so that the defendants would not be released prior to our ruling on the validity of that order. Thus, while our opinion is devoted to a discussion of the discovery order, ultimately we rule on the validity of the order dismissing the indictments.

In sum, the appeal is properly before us only because the government knowingly accepted the consequence of opting for an immediate appeal rather than complying with the discovery order. That consequence is that, if we affirm, the dismissal of the indictments must now be implemented unless the order dismissing them is further stayed pending review by the Supreme Court. It is too late for the government to change its mind and comply with the discovery order. Were that not the rule, we would simply be permitting appeals of discovery orders under the guise of reviewing dismissal orders that were either only tentative or were never intended to take effect. In either case, we would not have jurisdiction over the appeals under § 3731.

Because we hold that the defendants here satisfied the colorable basis requirement, we affirm the district court's dismissal of the indictments.

I.

In April of 1992, defendants Christopher Armstrong, Aaron Hampton, Freddie Mack, Shelton Martin, and Robert Rozelle were charged with federal offenses for their alleged involvement in the distribution of cocaine base, known colloquially as "crack" or "rock". The charges stemmed from an investigation conducted under the direction of a joint state and federal task force comprised of detectives from the Inglewood Narcotics Division and agents from the Bureau of Alcohol, Tobacco, and Firearms.

All five defendants were charged with conspiracy to distribute cocaine base under 21 U.S.C. § 846. Some of the defendants were also charged with selling cocaine base under 21 U.S.C. 841(a)(1) and using firearms in connection with drug trafficking in violation of 18 U.S.C. § 924(c). The decision to charge the defendants with federal rather than California state offenses was significant. Federal law imposes a minimum sentence of 10 years and a maximum of life for those convicted of selling more than 50 grams of cocaine base. 21 U.S.C. § 841(b). By contrast, under California law, the minimum sentence for that offense is three years and the maximum is five. Cal.Health & Safety Code § 11351.5 (Deering 1993). All five defendants are black.

On July 20, 1992, defendant Martin filed a Motion for Discovery and/or Dismissal of Indictment for Selective Prosecution. He claimed that the decision to prosecute him on federal charges was based on his race. The other four defendants timely joined the motion which was heard on September 8, 1992.

To support the motion for discovery, the defendants offered into evidence a study of every case involving a charge under 21 U.S.C. §§ 841 and 846 that the Federal Public Defender's Office for the Central District of California had *closed* in 1991. The study showed that in all 24 such cases the defendants had been black. At the hearing, counsel for the government responded to the judge's request for an explanation of these numbers by stating: "I would have no explanation for that. But certainly I can say that there is no racial motivation of any sort that I am aware of as to why we brought this case versus any others."

The district court granted the motion for discovery. Specifically, the district judge ordered the government to: (1) provide a list of all cases from the prior three years in which the government charged both cocaine base offenses and firearms offenses; (2) identify the race of the defendants in those cases; (3) identify whether state, federal, or joint law enforcement authorities investigated each case; and (4) explain the criteria used by the U.S. Attorney's Office for deciding whether to bring cocaine base cases to the federal court.

The government chose not to comply with the discovery order and instead filed a motion for reconsideration. In support of its motion, the government provided a list of all defendants charged with violations of 21 U.S.C. §§ 841 and 846 over a three-year period (without any racial breakdown) as well as declarations by three law enforcement officers and two Assistant United States Attorneys. The declarations collectively provided four explanations for the study's implication that the overwhelming bulk of federal prosecutions for cocaine base offenses targeted black defendants.

First, the declarations asserted that socioeconomic factors led certain ethnic and racial groups to be particularly involved with the distribution of certain drugs and that blacks were particularly involved in the Los Angeles-area crack trade. Second, the declarations contended that during the three-year period, seven non-black defendants had been prosecuted on federal cocaine base charges, although it appears that all of them were members of racial or ethnic minority groups. (Later, the government identified four more non-black defendants who had been prosecuted during that three-year period, all of whom were also persons of color.) Third, the declarations asserted that many blacks had been tried in state court for cocaine base offenses. Fourth, the declarations contained a description of some of the general factors on which federal prosecutors based their charging decisions for crack-related offenses. The factors specifically referred to were the strength of the evidence, the deterrent value of bringing the charge, the federal interest in the prosecution, and the suspect's criminal history. The declarations also referred to other unidentified "race-neutral" criteria.

In response, the defendants bolstered the statistical study they had submitted at the initial hearing with additional declarations. First, one of the defendant's counsel stated that she had spoken with a halfway house intake coordinator who told her that in his experience treating cocaine base addicts, whites and blacks dealt and used the drug in equal numbers. Second, another defense attorney asserted that his experience and conversations with judges, lawyers, and defendants led him to conclude that many non-blacks were prosecuted for cocaine base offenses in state court. Finally, the defendants submitted an article from the *Los Angeles Times* discussing the

disparate federal sentences imposed for cocaine base and regular cocaine offenses.

District Judge Consuelo Marshall denied the motion for reconsideration. She stated her reasons for the denial at the hearing: "The statistical data provided by the Defendant raises a question about the motivation of the Government which could be satisfied by the government disclosing its criteria, if there is any criteria, for bringing this case and others like it in Federal court. Without this criteria the statistical data is evidence and does suggest that the decisions to prosecute in Federal court could be motivated by race. Without expert testimony, this Court cannot conclude that the defendants' evidence is explained by social phenomena."

The government again chose not to comply with the discovery order. After some discussion among the parties and the court, the defendants moved to dismiss the indictments as a sanction. The district judge dismissed the indictments, but stayed the order pending appeal. The government timely appealed.

II.

We review for abuse of discretion a district court's decision to order discovery. *United States v. Bourgeois*, 964 F.2d 935, 937 (9th Cir.1992). We have previously stated that, "[t]he task of safeguarding the rights of criminal defendants ultimately rests with the experienced men and women who preside in our district courts." *United States v. Balough*, 820 F.2d 1485, 1491 (9th Cir.1987). District judges are well situated to observe possible discrimination in the government's charging decisions. They have direct experience with the policies and practices of the United States Attorneys in their districts and have the opportunity to discern patterns of discrimination.

See *United States v. Redondo-Lemos*, 955 F.2d 1296, 1298, 1302 (9th Cir.1992).

We are mindful that it is only a discovery order that we are reviewing. To obtain discovery, the defendants need not prove impermissible discrimination. To order discovery, the district court need not decide that the defendants have in fact demonstrated the existence of selective prosecution. If such conclusive determinations could be made without discovery, there would be no need for discovery in the first place. Thus, the evidence necessary to obtain a discovery order when a charge of selective prosecution has been made is obviously substantially less than that needed to prove the charge itself.

We conclude that discovery may be ordered when the evidence provides a colorable basis for believing that discriminatory prosecutorial selections have occurred. The existence of a colorable basis must be judged in light of all the evidence presented to the district court and not simply that offered by the defendant. "The United States Attorney must be given the chance to make whatever showing [he] deems appropriate to dispel the district judge's concerns." *Redondo-Lemos*, 955 F.2d at 1302; see also *Bourgeois*, 964 F.2d at 941 (considering government's response). However, if the government fails to make a showing sufficient to dispel those concerns, then a colorable basis remains even though the government has provided some evidence in response.

The colorable basis standard is met by "some evidence tending to show the essential elements of the claim." *United States v. Heidecke*, 900 F.2d 1155, 1159 (7th Cir.1990). Of course, "some evidence" means the showing must be more than frivolous and based on more than conclusory allegations. As we stated in *Bourgeois*,

to obtain discovery on a selective prosecution claim, a defendant must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of government actors.

964 F.2d at 939.

Because the meaning of "colorable basis" first articulated in *Bourgeois* has proved elusive, we believe it necessary to explain the standard more fully. In particular, we address here three aspects of the showing needed for discovery in a selective prosecution claim that may be unclear after *Bourgeois* and concerning which the parties strongly disagree.

First, *Bourgeois* stated that the colorable basis standard sets a "high threshold" that should rarely justify discovery. *Id.* at 940. This characterization of the standard appears to conflict with the opinion's earlier conclusion that the showing needed for discovery is less than that needed for a prima facie case. *Id.* at 939. In describing the colorable basis test as setting a "high threshold" that would be met only infrequently, our opinion resulted in more confusion than clarification. The "high threshold" language in *Bourgeois* appeared to set an artificially onerous burden in such claims. The inclusion of that language in our opinion was in error.

Second, *Bourgeois* did not adequately explicate what showing is necessary to create a colorable basis for believing that particular prosecutorial conduct has discriminatory effects and is motivated by a discriminatory purpose. To succeed on a claim of selective prosecution the defendant must show both that the prosecutorial selection "had a discriminatory

effect and that it was motivated by a discriminatory purpose." *Wayte v. United States*, 470 U.S. 598, 608, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985). However, *Wayte* made clear that "[i]t is appropriate to judge selective prosecution claims according to ordinary equal protection standards." *Id.*

A direct showing of discriminatory intent is not always necessary to make out an equal protection claim; under ordinary equal protection standards, a claimant may prove discriminatory purpose circumstantially. See *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 563-64, 50 L.Ed.2d 450 (1977). A circumstantial showing of intent may be based on evidence of discriminatory effects. "Evidence of the discriminatory impact of decisions is one sort of circumstantial evidence supporting an inference of . . . intent." *Diaz v. San Jose Unified School District*, 733 F.2d 660, 662 (9th Cir.1984) (en banc), *cert. denied* 471 U.S. 1065, 105 S.Ct. 2140, 85 L.Ed.2d 497 (1985); see also *Batson v. Kentucky*, 476 U.S. 79, 93, 106 S.Ct. 1712, 1721, 90 L.Ed.2d 69 (1986) ("Circumstantial evidence of invidious intent may include proof of disproportionate impact.").

Moreover, we have previously stated that statistical disparities alone may suffice to provide the evidence of discriminatory effect and intent that will establish a prima facie case of selective prosecution. See *Redondo-Lemos*, 955 F.2d at 1301-02.¹ Because

¹ To the extent that *United States v. Gutierrez* conflicts with this proposition by holding that a statistical disparity does not satisfy the effect prong of a prima facie showing of selective prosecution, we overrule it. See *United States v. Gutierrez*, 990 F.2d 472, 476 (9th Cir.1993) (implicitly holding that a significant statistical disparity will not alone satisfy the

the standard for a discovery showing is lower than that for a prima facie case, *Bourgeois*, 964 F.2d at 939, we hold that inadequately explained evidence of a significant statistical disparity in the race of those prosecuted suffices to show the colorable basis of discriminatory intent and effect that warrants discovery on a selective prosecution claim.

Finally, *Bourgeois* did not sufficiently emphasize that judges considering discovery requests on selective prosecution charges should bear in mind the evidentiary obstacles defendants face. The notorious difficulty of proving a race discrimination claim is particularly acute in the context of selective prosecution claims. Cf. *Wayte*, 470 U.S. at 624, 105 S.Ct. at 1539 (Marshall, J., dissenting). The broad discretion that prosecutors possess over charging

discriminatory effect prong of the prima facie case in selective prosecution claims). Accordingly, we reject the suggestion in the concurrence that while a defendant need not show that " 'others similarly situated' have not been prosecuted" under a colorable basis test, he must do so in order to establish a prima facie case. [P. 30a, *infra*] (Wallace, C.J., concurring). Finally, the suggestion in the dissent that this en banc court has no authority to overrule *Gutierrez* is simply wrong. Aside from the fact that there is no legal basis for questioning an en banc court's authority to overrule a case in order to "secure or maintain the uniformity of [our] decisions," Fed.R.App.P. 35(a)(1), and the fact that our conclusion that it is necessary to do so in this case is binding on future panels whether or not they agree with that determination, here the reason we overrule *Gutierrez* is clear. There is a direct and interdependent relationship between what is needed to establish a colorable basis and what is needed to establish a prima facie case. As the dissent acknowledges, "[d]iscovery cannot be unhinged from the merits." [P. 49a, *infra*] n. 10 (Rymer, J., dissenting). Our examination of the prima facie standard is a necessary step, therefore, in our determination of what constitutes a colorable basis.

decisions means that they alone will often possess the only information that would demonstrate such discrimination. *Id.* As a result, the data necessary to a showing of selective prosecution are far less accessible to the defendants than to the government.

Defendants attempting to show a colorable basis that warrants discovery can only be expected to make good faith efforts to obtain whatever evidence is readily available, as well as to provide whatever evidence is already in their possession. *Cf. Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 563-64 (a court assessing an equal protection claim based on race discrimination must engage in "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." (emphasis added)). Defendants are not required to present sophisticated regression analyses closely following the dictates of the scientific method nor a "smoking gun" that irrefutably demonstrates the existence of prosecutorial bias. Nor are defendants required to compile facts which are not easily obtainable by them, such as the racial breakdown and offense characteristics of defendants represented by other counsel.

The colorable basis standard we enunciate today brings our approach to discovery in selective prosecution claims more in line with that of the other circuits. While all the circuits have considered the issue, only four apply a stricter test. Moreover, each of those four requires a *prima facie* showing,² a

² See *United States v. Penagaricano-Soler*, 911 F.2d 833, 838 (1st Cir.1990); *St. German of Alaska Eastern Orthodox Catholic Church v. United States*, 840 F.2d 1087, 1095 (2d Cir.1988); *United States v. Johnson*, 577 F.2d 1304, 1308 (5th Cir.1978); *United States v. Parham*, 16 F.3d 844, 847 (8th Cir.1994) (stating that the "burden is a heavy one").

standard which even the dissent rejects as being too high. See *Post* at 1526-27. By contrast, the "colorable basis" test we set forth mirrors the approach taken by the Third, Sixth, Seventh, Tenth, and D.C. Circuits. Each of those circuits permits discovery when the defendants introduce some evidence tending to show the essential elements of selective prosecution and the government fails to explain it adequately.³ Finally, our approach is certainly more akin to that favored by the two circuits that have adopted a version of the non-frivolousness standard advocated by the dissenters in *Wayte*.⁴

The colorable basis standard not only best reflects the prevailing view of the law, but it also effectively

³ See *In Re Grand Jury*, 619 F.2d 1022, 1030 (3d Cir.1980) (holding that "some credible evidence must be adduced" (citation omitted)); *United States v. Adams*, 870 F.2d 1140, 1146 (6th Cir.1989) (adopting "some evidence" test); *Heidecke*, 900 F.2d at 1158 (7th Cir.) (same); *United States v. P.H.E., Inc.*, 965 F.2d 848, 860 (10th Cir.1992) (approving approach adopted by the Sixth Circuit in *Adams*); *Attorney General of United States v. Irish People, Inc.*, 684 F.2d 928, 948 (D.C.Cir.1982) (explaining that "some evidence tending to show the essential elements of [the selective prosecution claim]" is consistent with a "colorable showing" (internal quotation marks and citation omitted)); see also *United States v. Washington*, 705 F.2d 489, 494-95 (D.C.Cir.1983) (noting that the district court permitted discovery under the "colorable showing" test but affirming the denial of the selective prosecution claim).

⁴ See *United States v. Gordon*, 817 F.2d 1538, 1540 (11th Cir.), *rev'd and vacated in part on other grounds*, 836 F.2d 1312 (1988) ("colorable entitlement" met by evidence that is non-frivolous and raises a reasonable doubt); *United States v. Greenwood*, 796 F.2d 49, 52 (4th Cir.1986) (holding that allegations that raise "at least a legitimate issue" of selective prosecution merit discovery unless the "government's explanation" is convincing).

accommodates the twin but conflicting concerns that discovery in selective prosecution claims implicates. On the one hand, selective prosecution claims call into question the very integrity of our system of criminal justice by suggesting that prosecutorial decisions have been “‘deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’” *Wayte v. United States*, 470 U.S. at 608, 105 S.Ct. at 1531 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668-69, 54 L.Ed.2d 604 (1978)) (further quotation omitted). This concern compels district courts to be vigilant in ensuring that impermissible prosecutorial biases do not remain hidden in files kept from public view.

On the other hand, selective prosecution claims invite the courts to investigate the discretionary charging decisions of executive branch officials that traditionally have not been subject to strict oversight. Separation of powers concerns and the systemic costs that such judicial intrusions entail caution against setting the threshold showing for discovery so low that even frivolous assertions of prosecutorial bias may require the government to lay bare its files. *See Wayte*, 470 U.S. at 607, 105 S.Ct. at 1530.

The colorable basis standard ensures that the government will not be called to answer for its charging decisions as a result of frivolous and unwarranted allegations. At the same time, the standard ensures that defendants will not face unjustified hurdles at the discovery stage that will preclude them from demonstrating the existence of

actual discrimination in the selection of defendants for criminal prosecution.⁵

III.

Here, the defendants have presented sufficient evidence to provide a colorable basis for believing that the government has engaged in discriminatory prosecution. They have provided statistical evidence suggesting that blacks are disproportionately charged with federal crack offenses. The government has not offered evidence in response that is sufficiently persuasive to refute the inference that may reasonably be drawn from the statistics. Thus, the district judge is not precluded from determining in her discretion that a colorable basis for selective prosecution has been shown.

A.

The study conducted by the Office of the Federal Public Defender provides a colorable basis for concluding that invidious discrimination may have occurred. The study found that, of all cocaine base

⁵ We do not consider here the question of whether or under what circumstances a judge may rely on facts within his own experience in satisfying the colorable basis standard. *See Redondo-Lemos*, 955 F.2d at 1300-03. That question is not before us. We conclude only that whatever the form of the evidence and whatever the source, the colorable basis standard is applicable. We disapprove any contrary statement in *Redondo-Lemos*.

We note, however, that we review certain types of rulings under an abuse of discretion or clearly erroneous standard rather than de novo because of the trial court's “‘experience with the mainsprings of human conduct.’” *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.1984) (en banc) (quoting *Commissioner v. Duberstein*, 363 U.S. 278, 289, 80 S.Ct. 1190, 1198-99, 4 L.Ed.2d 1218 (1960)).

cases closed by the Office in 1991, 24 out of 24 involved black defendants. To be sure, such a small number of cases does not conclusively establish either of the elements of selective prosecution. However, the fact that every single crack defendant represented by the Federal Public Defender in all cases that terminated during 1991 was black provides a colorable basis for believing that the challenged prosecutorial policies are driven by discriminatory motives and yield discriminatory effects. As a result, the study raises enough of a question to justify further inquiry.

The evidence of discriminatory prosecution in this case is much stronger than the evidence we held insufficient in *Bourgeois*. In that case, the defendants argued that they were entitled to discovery based on a showing that all prosecutions for firearms violations stemming from a *two-day* police operation involved black defendants. The district court rejected the defendants' claims, holding in part that two days was far too short a period to serve as a basis for analyzing the overall conduct of a prosecutorial agency. Instead of focusing on the single operation that resulted in the arrests of *Bourgeois* and his associates, the district court looked instead to all firearms prosecutions over a two-year span. The court found that the government had prosecuted over 140 people during that period for the same crimes as those for which *Bourgeois* was prosecuted. Because *Bourgeois* "did not allege that all or most of these cases involved blacks," *Bourgeois*, 964 F.2d at 940, the district court concluded that he had not established a colorable basis to justify discovery. We held that the district court did not abuse its discretion in refusing to order discovery in these circumstances. *See id.* at 941.

The evidence offered in *Bourgeois* involved only one operation, over a single two-day period. The Federal Public Defender study, by contrast, involved an agency that represents a significant percentage of all federal criminal defendants, and it involved all cases closed over a significant period of time. Common sense indicates that such a study provides a much stronger basis for reasonably inferring invidious discrimination than does an analysis of only a single, short police operation. *See id.* ("[T]he relevant inquiry is the history of prosecutions over a reasonable period of time.").

The Federal Public Defender study showed that the largest single provider of legal services to federal criminal defendants in the Central District of California did not close a single case involving a crack charge against a non-black defendant in all of 1991. Although the number of cases is too small to resolve the issue either way, it certainly constitutes "some evidence tending to show the essential elements" of the defendants' claim.

The district judge based the discovery order on precisely this reasoning. "I think the number is adequate that would at least require the Government to provide some explanation. The time period is such that would require some explanation. The charges are the same or similar, and the race is the same in each case." A district judge's decision to permit further inquiry into the issue based on such an analysis cannot fairly be considered to be an abuse of discretion.

B.

In determining whether a colorable basis for discovery exists, the district judge cannot discount the government's attempts to explain the evidence

introduced by the defendant. A colorable basis must still exist after all the evidence presented by both sides has been considered. However, in evaluating the adequacy of the government's response, the judge may exercise considerable discretion. We, in turn, give broad deference to the district court's determinations. See *Bourgeois*, 964 F.2d at 937.

Here, the government proffers three responses to the defendants' showing. First, the government challenges the defendant's study and contends that its limited scope could not reasonably suggest any race-based disparity in the treatment of crack offenders by federal prosecutors. Second, the government contends that even if the defendants' showing did suggest such a racial disparity, socioeconomic forces and race-neutral charging criteria rather than prosecutorial discrimination explain that disparity. Finally, the government contends that the defendants made no showing of discriminatory purpose. The district judge did not abuse her discretion in concluding that these responses do not effectively dispel the colorable basis for discrimination that the defendants' showing created.

The government contends that the study does not demonstrate any discriminatory effect because it shows only that blacks have been prosecuted, not that others of different races and similarly situated have not. But a defendant is not required to demonstrate that the government has failed to prosecute others who are similarly situated. He need only provide a colorable basis for believing that other similarly situated persons have not been prosecuted. The study introduced by defendants clearly satisfies this requirement. "At a threshold level, whether or not there is a significant disparity in the treatment of classes of defendants can normally be determined on

the basis of statistical evidence, without reference to the underlying facts of individual cases." *Redondo-Lemos*, 955 F.2d at 1301.

Given the prevalence of all kinds of drugs throughout our community, at least some crack distributors are likely to be non-blacks. We must start with the presumption that people of all races commit all types of crimes—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group. These presumptions and premises are, of course, not conclusive. Still, absent some compelling contrary evidence, we must assume that crime knows no exclusive race or creed.⁶

Here, the government's own showing in and of itself provides evidence that similarly situated potential defendants of other races do exist—in other words that non-blacks also commit violations of 21 U.S.C. §§ 841 and 846. Thus, here the government does not take the unsupportable position that *only* blacks commit the crimes with which the defendants are charged.

⁶ Accordingly, the dissent's repeated calls for a "comparison pool" simply miss the point. The fact that evidence of similarly situated persons who were not prosecuted was submitted in other kinds of selective prosecution claims is of no significance in the context of a selective prosecution case based on race. Certainly, no "comparison pool" is necessary when the record contains statistical evidence tending to show that only members of racial or ethnic minority groups have been prosecuted. Were we to conclude otherwise, we would be accepting unwarranted racial stereotypes. Of course, as we explain, the government is free either to show that the record is incomplete or that a reasonable explanation exists for the statistical evidence. That is what the government failed to do here.

The fact that the government has identified some non-black crack offenders who have been *charged* with federal crimes, however, does not undermine the accuracy or the force of the study. The government has not identified a single non-black cocaine base case *closed* by the Federal Public Defender's Office (or anyone else) during the study's one-year time period. Instead, the government introduced evidence to show that over a three-year period some federal cocaine base prosecutions of members of other minorities did occur. None of the cases, however, fell within the parameters of the study. As a result, the government's identification of these cases fails to undermine the accuracy of the study in any respect.⁷

In the absence of a response undermining the study's accuracy, the district judge appropriately gave credence to the defendants' showing that a study of federal cocaine base cases *closed* by the federal public defender over a particular period of time showed that *only* black defendants were involved. These results are highly suggestive of the fact that blacks constitute at the very least a disproportionate number of those charged with federal crack offenses.

Of course, the government could have demonstrated that the study's results were a mere statistical fluke and that pure chance explains the fact that the only cases closed during the relevant period were

⁷ The dissent complains that the study looks at all cases closed and suggests that it would have been preferable to look at all cases opened. We fail to see the difference. While there may be better ways to conduct a statistical study, we think that examining closed cases is not an unreasonable one. In this regard, we note that the factor used to choose the cases examined in the study—whether the case had been closed—was a factor independent of and not correlated with race.

those involving black defendants. But the government failed to do that as well. Instead, the government's evidence showed only that during a three-year period in which several thousand people were charged with violations of §§ 841(a)(1) and 846, it was only able to identify 11 ~~non~~-black defendants charged with crack cocaine offenses under these statutes, all of whom were members of racial or ethnic minority groups. The identification of a handful of non-black crack offenders (all of whom also happened to be persons of color) does nothing to suggest that the study's inference of race-based disparity is untenable. Indeed, the fact that the government could identify so few non-blacks charged with federal crack offenses is entirely consistent with the study's inference that those charged federally with cocaine base offenses belong virtually exclusively to one racial group.

Of course, in finding that the Federal Public Defender study provides a colorable basis for concluding that discriminatory prosecution may have occurred, we do not determine that the study establishes that the United States Attorney has engaged in such invidious conduct. Rather, it serves only as some evidence that tends to show that the United States Attorney may be engaging in discrimination and suggests that further inquiry on the subject is warranted. That is precisely the course the district court took here by permitting discovery, and it did not abuse its discretion in doing so.

The government argues in the alternative that even if the defendants' evidence does suggest a disparity in the treatment of crack offenders on the basis of race, that disparity can be explained by reasons apart from the existence of discriminatory prosecution. Explanations for apparent racial dis-

parities can in some circumstances effectively explain evidence that on its own would provide a basis for ordering discovery. For example, in *Bourgeois*, discovery was denied largely because the government had offered a compelling explanation of why all those arrested in the two-day sweep were black. The government there explained that the sweep had focused on a particularly dangerous criminal gang of which all members were black. The defendants had made no showing that an overwhelming majority of gang prosecutions focused on black defendants or that the two-day action was in any way representative of what occurred over a longer period. Thus, the government's response provided the court with a compelling explanation of why all those prosecuted during the sweep were black. See *Bourgeois*, 964 F.2d at 941.

In its attempt to explain the alleged disparity here, the government offers essentially two responses. Neither response is of a kind that we can hold adequate to dispel the defendants' showing of a colorable basis. First, the government asserts that blacks in fact commit crack related offenses in disproportionate numbers. As the district judge noted, this assertion is based only on the generalized statements of DEA agents and not expert sociological testimony. Moreover, the response does not speak to the inference that blacks are more frequently prosecuted for *federal* crack offenses than even their allegedly disproportionate involvement with the drug would justify.

The defendants additional submissions addressed the latter point. On the government's motion for reconsideration, the defendants introduced two declarations from defense attorneys that provided additional support for the conclusion that the

charging decisions may have been discriminatory. One declaration set forth a statement made by an intake coordinator at a Pasadena halfway house who said that, in his experience, there were an equal number of white and non-white users and dealers of crack. The other declaration was from David R. Reed, an experienced criminal defense attorney in the Central District. Reed stated that, in his experience as a federal criminal defense lawyer and as a director of the state court indigent defense panel, he had never handled, known of, or heard of a single federal crack cocaine case involving non-black defendants, but that he knew of many crack cocaine prosecutions against non-blacks in state court.⁸

The government's response that blacks are disproportionately involved in the crack trade is simply a non-sequitur. Even if it were true that blacks commit crack offenses in greater numbers than others, that fact would not explain why black violators are more likely than their non-black counterparts in the crack trade to be charged with a federal than a state offense. In short, the response simply does not undermine the inference from the evidence, including the Reed declaration, that a crack offender's race is a factor that prosecutors rely on in deciding whether to charge him with a *federal* offense. Precisely this gap in the government's explanation caused the district judge to believe discovery was needed. "[W]hat the court wants to

⁸ The government did not object to the admissibility of these declarations. As a result, the declarations constitute probative evidence. *N.L.R.B. v. International Union of Operating Engineers, Local Union No. 12*, 413 F.2d 705, 707-08 (9th Cir.1969) (holding that "[u]nobjected to hearsay is admissible and is of probative value in the district courts").

know is whether or not there is any criteria in deciding which of these cases will be filed in state court versus Federal court and if so, what is that criteria. That is the problem I think that needs to be addressed, because we do see a lot of the cases and one does ask why some are in state court and some are being prosecuted in Federal court, and if it's not based on race, what's it based on?"

Second, the government attempted to assure the court that its charging decisions had nothing to do with race. To dispel the inference that race plays a part in the charging decisions of federal prosecutors, the government provided the district court with a general description of some of the criteria it relies on in making such judgments. The government submitted a declaration from David C. Scheper, Assistant United States Attorney and Chief of the Major Crimes unit in the United States Attorney's Office for the Central District of California, in which he purported to delineate the criteria. "All charging decisions are made on the basis of whether a federal offense that meets this Office's guidelines has occurred, the overall strength of the evidence, the deterrence value and federal interest associated with the particular case, the criminal history of the suspects, and *other race-neutral criteria*." (emphasis added). It was well within the district court's discretion to conclude that the recitation by Mr. Scheper of these vague, generalized, and even unspecified criteria was insufficient to rebut the evidence submitted by the defendants. Just as defendants may not rely on conclusory assertions to meet the colorable basis test, the government may not

rely on its alleged use of amorphous criteria to explain a showing that satisfies the standard.⁹

Given the circumstantial evidence of discrimination that the statistical evidence provides, the government's simple assertion that it relies on unspecified race-neutral criteria cannot suffice to foreclose further inquiry. More in the way of concrete facts is necessary. Blanket denials of discrimination, though often (but not always) made in good faith, are to be expected in cases such as these. The availability of discovery must not turn on the unlikely event that a federal prosecutor will confess to private biases. As the district judge noted in assessing the government's denial of racist motivations, "I'm not sure we'd find anybody that would say [otherwise]."

Finally, we note that the government's contention that no evidence of discriminatory purpose has been shown is unavailing. As our earlier discussion makes clear, an unexplained race-based statistical disparity can itself be sufficient circumstantial evidence of discriminatory intent to justify discovery. Cf. *Redondo-Lemos*, 955 F.2d at 1301 (finding that such

⁹ The dissent misleadingly characterizes this declaration. See *Post* at 1522-23. The specific factors listed by the dissent and said to be applicable to the defendants in this case were never shown to be part of any federal charging criteria. As the district court ruled, the government failed to disclose the criteria used by the United States Attorney in deciding whether to prosecute drug offenses. Thus, the declaration did not "explain" why the decisions to prosecute the *Armstrong* defendants were "consistent with the guidelines." *Post* at 1522. Rather, the declaration merely *asserted* that they were. In short, the district court was provided with wholly inadequate information concerning the criteria set forth in the guidelines.

evidence may establish a prima facie case); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir.), *rev'd and vacated in part on other grounds*, 836 F.2d 1312 (1988) (finding that circumstantial evidence of intent establishes a prima facie case). We conclude that the Federal Defender Study, analyzing as it did the cases closed over a full year period, provided such circumstantial evidence of intent as is required to be shown at the discovery stage.

C.

When all of the evidence is taken together, the defendants have established several "specific facts, not mere allegations, which establish a colorable basis" to believe that the government has engaged in selective prosecution. *Bourgeois*, 964 F.2d at 939. Moreover, the government has not explained the evidence of a colorable basis in a manner that would justify our holding that the district judge abused her discretion in concluding that further statistical inquiry and elaboration of governmental charging criteria was justified. A district judge observes countless prosecutions in the course of even a brief stay on the bench. There is no reason to believe that such judges are easily convinced that the prosecutors who appear before them on a daily basis may be carrying out discriminatory policies. When a district judge does find that there is evidence that reasonably permits one to find a colorable basis for concluding that race-based prosecutorial selection may have occurred, and when the government does not provide an explanation that persuasively undermines such a conclusion, a reviewing court should be reluctant to discount that judgment.

IV.

There are few claims as serious as the charge put forth by the defendants here—that the government has selected them for prosecution because of their race. Such claims deserve the most careful examination by the courts so that the prosecutorial power does not become a license to discriminate based on race. Discovery is the crucial means by which defendants may provide a trial judge with the information needed in order to determine whether a claim of selective prosecution is meritorious. There is no basis for concluding that Judge Marshall *abused her discretion* in trying to conduct a careful examination of the defendants' charges or in determining that the defendants made a *colorable* showing of discriminatory enforcement of the law. Judge Marshall acted properly by authorizing the defendants to inquire further into this issue. Her discovery order was clearly within her discretion. We affirm the sanction she imposed for the government's failure to comply. As a consequence, the dismissals of the indictments are

AFFIRMED.

WALLACE, Chief Judge, concurring:

This case requires us to set forth the appropriate test for determining whether a sufficient showing has been made to allow discovery in a selective prosecution claim. I thought we could all agree that this test should be the one that our court developed in *United States v. Bourgeois*, 964 F.2d 935 (9th Cir.) (Bourgeois,), *cert. denied*, — U.S. —, 113 S.Ct. 290, 121 L.Ed.2d 215 (1992). There, we held that “to obtain discovery on a selective prosecution claim, a defendant must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of government actors.” *Id.* at 939. What divides us is whether that standard should be rewritten and its application to this case. I believe that the result the majority reaches is correct, and to that extent I concur. I write separately, however, to discuss why I do so.

I

The majority correctly points out that the dismissal of the indictment as a sanction for non-compliance with the discovery order creates the appealable order that gives us jurisdiction over this appeal. However, this does not mean that the dismissal must be interpreted to be with prejudice. For a dismissal to be with prejudice, “the prosecution must be forewarned” of that fact. *United States v. Loud Hawk*, 628 F.2d 1139, 1151 (9th Cir.1979) (en banc), *cert. denied*, 445 U.S. 917, 100 S.Ct. 1279, 63 L.Ed.2d 602 (1980). While the government agreed to the sanction in this case in order to effectuate the appeal, it does not appear in the record before us that the government was forewarned of any sanction that would forbid further proceedings against the defendants.

II

Turning to the merits, the majority, in an attempt to “clarify” the *Bourgeois* standard, goes too far. *Bourgeois* held that “the discovery threshold should not be so high as to require establishment of a prima facie case.” *Bourgeois*, 964 F.2d at 939. Thus, according to *Bourgeois*, even though the defendant must make some showing that the elements of a selective prosecution claim can be met, that showing is less than what is ultimately required to prove selective prosecution. *Bourgeois*, as written, is sufficient for us to decide the case before us.

Undeterred, however, the majority attempts to “clarify” this test by stating that the “‘high threshold’ language in *Bourgeois* appeared to set an artificially onerous burden” on discovery. While the formulation of the colorable basis test shows that the test is certainly not as “high” as that required to prove a prima facie case, neither is it as “low” as a nonfrivolous showing. The dissent’s discussion to the effect that a high threshold “is appropriate because courts are ill equipped to assess a prosecutor’s charging decisions, and oversight of prosecutorial decisions could undermine effective law enforcement” seems to me correct. To the extent that the majority opinion undermines this idea, I disagree, and align myself with the analysis of the dissent.

On the other hand, my agreement with the majority’s result is supported by a very similar observation about our role as a federal appellate court. Just as the district court should be careful not to undermine effective law enforcement by constantly evaluating the prosecutor’s charging decisions, so too should we, as an appellate court, not second-guess the ruling of a district court in a close case. We are able to carry

out this function by adhering to our standards of review.

When reviewing the district court's discovery ruling on a selective prosecution claim, we ask whether the district court abused its discretion. *Id.* at 937; see also *United States v. Bryan*, 868 F.2d 1032, 1035 (9th Cir.), cert. denied, 493 U.S. 858, 110 S.Ct. 167, 107 L.Ed.2d 124 (1989). What this means is that "[a]bsent a definite and firm conviction that the district court committed a clear error of judgment, we will not disturb the district court's decision." *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir.1990).

In this case, the defendant provided: (1) evidence that all 24 cocaine base cases closed in 1991 by the Federal Public Defender involved black defendants; (2) two additional affidavits stating that there are Caucasian cocaine base users and that the number of such users prosecuted in state court is greater than the number prosecuted in federal court; and (3) a Los Angeles Times article stating that federal cocaine base laws carry tougher sentences. The district court, applying the *Bourgeois* standard, found that a colorable basis had been met, and ordered limited discovery. Because the abuse of discretion standard permits the district court flexibility, I conclude we should not overturn that order in this case.

The dissent argues that, as a matter of law, the colorable basis test has not been met. This conclusion is driven largely by the fact that there has been no showing here that "others similarly situated" have not been prosecuted. I agree with the dissent that to establish a prima facie case, hard data about others similarly situated is necessary. Proving a prima facie case of selective prosecution requires proof: (1) that others similarly situated have

not been prosecuted, and (2) that the prosecution is based on an impermissible motive (discriminatory purpose or intent). *United States v. Gutierrez*, 990 F.2d 472, 475 (9th Cir.1993). To the extent the majority disagrees with this formulation, and discusses how the statistical evidence here might be sufficient to prove both effect and intent, I do not concur. But this is all beside the point at the discovery stage, where only some evidence, tending to show selective prosecution, is required. Where there is evidence of a large enough number of prosecutions directed at a single race over a sufficiently long period of time, eventually there becomes a point where that evidence is sufficient to establish a colorable basis of selective prosecution.

The language of the colorable basis standard does indicate that specific facts must exist to establish the basis for believing that "discriminatory application of law" and "discriminatory intent" are present. But without discovery, the contention that "others similarly situated" have not been prosecuted (a claim essential to the prima facie case) may be impossible to show. The evidence produced by the defense in this case presents a close question, and, had I been the district judge, I might well have concluded that it was insufficient to make out a colorable basis. Indeed, this en banc case might have resulted in a different outcome were we to review the district judge's decision de novo. I am unable, however, to conclude that the district judge abused her discretion in allowing limited discovery.

I therefore concur in the result reached by the majority.

RYMER, Circuit Judge, with whom Circuit Judges LEAVY, T.G. NELSON, and KLEINFELD, join, dissenting:

For the first time in this circuit or any other, the en banc court has held that a raw number of prosecutions, without reference to a comparison group and without evidence that others, similarly situated except for their race, have not been prosecuted, provides a colorable basis for the existence of both discriminatory effect and discriminatory intent sufficient to order discovery from the government in connection with a criminal defendant's selective prosecution defense. Also, though both the Supreme Court and this circuit have made clear that discriminatory effect and discriminatory intent are two different elements, each of which must exist, the majority's opinion effectively collapses intent into effect by holding that both may be shown by the same, insubstantial statistic. Additionally the opinion has formally removed the "high threshold" that, until now, we explicitly (and other circuits implicitly) have required to be met before discovery relating to a selective prosecution claim can be ordered. In so doing, the majority opinion radically, and unnecessarily, rewrites the law of selective prosecution. I therefore dissent.

I

The government's appeal requires us to decide whether five defendants indicted in 1992 for conspiring to distribute cocaine base (in part through using an armed guard) in violation of 21 U.S.C. §§ 846 and 841(a)(1), four of whom are also charged with using a firearm in connection with the drug offenses under 18 U.S.C. § 924(c), are entitled to discovery on their claimed defense of selective prosecution on

account of race.¹ I would hold that they are not because Armstrong has failed to show a colorable basis for the existence of either of the elements required for selective prosecution, discriminatory effect and discriminatory intent.

Armstrong seeks to show that this prosecution was undertaken not because of the crimes committed, but rather because the United States Attorney's Office prosecuted these defendants as part of a systematic policy intentionally to discriminate against blacks in its prosecutorial decisions. The discovery request was based on evidence that of the 24 defendants represented by the Federal Public Defender's Office (FPD) in § 846 and § 841(a)(1) cocaine base cases closed by the FPD in 1991, all were black. The filing stamp numbers on the closed cases in this study range from "88" to "91," indicating that the defendants whose cases were closed by the FPD in 1991 were prosecuted over a four-year period.

After the district court ordered discovery, the government moved for reconsideration and presented evidence that at least four non-black defendants were prosecuted on crack charges during the period when the cases in the FPD's study were opened, two of whom were represented by the FPD, and at least seven were charged in 1992, the year the *Armstrong* defendants were indicted. In addition, the government submitted declarations indicating that in total, without breakdown by type of drug, approximately 2400 persons were charged with violations of § 841, and 1700 with violations of § 846, in the past three years; that race played no part in the investigation which resulted in the *Armstrong* defendants' arrests;

¹ I refer to all of the defendants collectively as "Armstrong."

that the county district attorney's offices prosecute many black cocaine base offenders; that socioeconomic factors account for the prevalence of drugs and trafficking patterns in different communities; and that all charging decisions made by the United States Attorney's Office, including in this case, are made on the basis of whether a federal offense meeting the Office's guidelines has occurred, the overall strength of the evidence, the deterrence value and federal interest associated with the particular case, the criminal history of the suspects, and other race-neutral criteria. Specifically as to this case, the declaration of the then-Chief of the Criminal Complaints Section explained why the Armstrong defendants were prosecuted and stated that the decision to charge them was consistent with the guidelines: there were over 100 grams of cocaine base involved—more than twice the quantity necessary to trigger a ten year mandatory minimum sentence; there were multiple sales involving multiple defendants, thereby indicating a substantial crack cocaine ring; the case was jointly investigated with a federal Bureau of Alcohol, Tobacco and Firearms agent; there were multiple federal firearms violations intertwined with the narcotics trafficking; the overall evidence was extremely strong, including audio and videotapes of the defendants; threats had been made to arresting officers by Armstrong; and several of the defendants had criminal histories including narcotics and firearms violations.

Armstrong countered with a declaration by defense counsel stating that she had spoken with a halfway house intake coordinator who told her that in his experience in treating cocaine base addiction, the number of caucasian and minority users and dealers is the same. Armstrong also offered a declaration by

another defense attorney averring that of the defendants facing crack charges whom he has represented in federal court, all were black, and that he has never heard of non-blacks being prosecuted in federal court, whereas based on what he has heard, he believes that the state prosecutes many non-black cocaine base offenders in state court. Finally, Armstrong proffered an article from the *Los Angeles Times*, which indicates that blacks disproportionately commit cocaine base offenses.

The district court found that Armstrong had made a sufficient showing to require the government to provide to the defense:

- (1) A list of all cases from the prior three years in which the government charged both cocaine base offenses and firearms offenses;
- (2) The race of the defendant(s) in each of those cases;
- (3) Whether each case was investigated by federal, state or joint law enforcement authorities; and
- (4) An explanation of the criteria used by the United States Attorney's Office for deciding whether to bring cocaine base cases federally.

The court's initial ruling concluded:

In this case we have a fairly general charge—one that we see regularly in this courthouse—and whether it's coincidental or not, that out of the group that the public defender—that Ms. O'Connor provides us information on—all of them happen to be of the same racial group.

I think the number is adequate that would at least require the Government to provide some explanation. The time period is such that would

require some explanation. The charges are the same or similar, and the race is the same in each case.

In denying the motion to reconsider, the court further concluded:

The statistical data provided by the Defendant raises a question about the motivation of the Government which could be satisfied by the Government disclosing its criteria, if there is any criteria, for bringing this case and others like it in Federal court.

Without the criteria, the statistical data is evidence and does suggest that the decision to prosecute in Federal court could be motivated by race.

Without expert testimony, this Court cannot conclude that the Defendants' evidence is explained by social phenomena.

The executive branch has a responsibility to dissuade public opinion that its decisions to prosecute or where to prosecute are not motivated by improper reasons such as race, and the evidence of who was prosecuted and why those persons were prosecuted and where those persons were prosecuted is within the peculiar knowledge of the Government and therefore, as the Court indicated at the previous hearing, it would be this Court's position that it is the Government that would have to provide that evidence so that Defendants could analyze it and decide if there is any basis for filing a motion to dismiss.

The government declined to comply with the order, and the court granted Armstrong's motion to dismiss. This appeal followed.

The panel, relying on *United States v. Bourgeois*, 964 F.2d 935 (9th Cir.), cert. denied, — U.S. —, 113 S. Ct. 290, 121 L.Ed.2d 215 (1992), reversed on the ground that a defendant must supply a colorable basis for believing that others similar to him—except that they are not in his protected class—were not prosecuted, and that other evidence adduced by Armstrong was too flimsy to be accorded any weight. *United States v. Armstrong*, 21 F.3d 1431 (9th Cir. 1994).²

We went en banc in part to resolve the tension between *Bourgeois* ("colorable basis" founded on specific facts required for discovery of whether prosecution is discriminatory) and *United States v. Redondo-Lemos*, 955 F.2d 1296 (9th Cir. 1992) ("prima facie showing" required to make prosecution answer for a particular charging or plea bargaining decision satisfied by district court's sua sponte suspicion of unconstitutional conduct or a defendant's evidence demonstrating reasonable inference of invidious discrimination), which the panel construed as being limited to discovery orders based on the judge's own experience. Without commenting one way or the other on a court's sua sponte powers to initiate a selective prosecution inquiry because that issue is not before us,³ I agree with the majority that discovery should be governed by a single standard.

² Hon. Harlington Wood, Jr., Senior United States Circuit Judge, Seventh Circuit Court of Appeals, sitting by designation, wrote for the court. I joined that opinion, and Judge Reinhardt dissented.

³ The district judge in this case ruled on the basis of the defendants' motion for discovery.

Although the majority opinion indicates that it does not consider the question of whether or under what circumstances a judge may rely on facts within her own experience, [pp. 7a-

However, I disagree with the majority's opinion. Although it appears to embrace the "colorable basis" standard we adopted in *Bourgeois*, the opinion actually guts it by holding that when a selective prosecution claim is based on race, evidence "tending to show that only members of racial or ethnic minority groups have been prosecuted" will suffice. [P. 19a, *supra*], n. 6. Instead, I would reaffirm the *Bourgeois* standard, and hold that the district court erred as a matter of law in finding that Armstrong made an adequate showing in the absence of any evidence that others, similarly situated except for being non-black, were not prosecuted. By the same token, the court should not have ordered discovery based on its conclusion that "the statistical data provided by the Defendant raises a question about the motivation of the Government"; the proper legal standard is not whether the defendant's evidence "raises a question," but whether it provides a *colorable basis* for the *existence* of discriminatory effect and discriminatory intent. In the absence of any evidence that the government purposefully selected these defendants for prosecution on account of their race, there is no colorable basis for the existence of discriminatory intent as a matter of law. The district court also went astray in founding its order on a "fairly general charge" instead of on specific facts as to these defendants. Further, at the

8a, *supra*], it cites *Redondo-Lemos*, 955 F.2d at 1298, 1302, with approval on the point that district judges are well situated to discern "patterns of discrimination." [Pp. 7A-8a, *supra*]. To the extent this simply means that when exercising discretion within the law, reviewing courts should be deferential to the district judge, I could not agree more. However, to the extent that the opinion means to endorse discovery based on something outside the record, it is dicta and I disagree.

discovery stage, it is the defendant's burden to provide facts that, if fleshed out by the discovery sought, would tend to prove both elements of selective prosecution. Thus, the district court's order fails in two additional respects: first, it shifts to the government the "responsibility to dissuade public opinion," but ignores the government's submissions; and second, the discovery ordered does not advance the ball game because racial identity and criteria for federally charging crack and firearms violations will still only show who was prosecuted, not who wasn't. In any event, the FPD's study relates to crack cases closed by that office and says nothing about any pool of *crack and firearms* offenders. As the discovery that was ordered targets prosecutions for both crack and firearms violations, it lacks any basis at all. I would, therefore, reverse.

II

Armstrong contends that the en banc court should adopt the "reasonable inference" test articulated in *Redondo-Lemos* instead of the "colorable basis" standard set out in *Bourgeois*. Short of this, he suggests that *Bourgeois* and *Redondo-Lemos* could be reconciled by defining "colorable basis" as the Seventh Circuit did in *United States v. Heidecke*, 900 F.2d 1155 (7th Cir.1990), to mean that a defendant need only produce "some evidence to show the essential elements of the claim." *Id.* at 1159.

I do not believe that it is necessary to do more than resolve the conflict between *Bourgeois* and *Redondo-Lemos*, because the evidence in this case does not pass muster under either the *Bourgeois* or *Heidecke* standard. See *United States v. Kerley*, 787 F.2d 1147, 1150 (7th Cir. 1986) (applying *Heidecke* test suggested by Armstrong but reversing discovery order

because the defendant presented no evidence that he was singled out for prosecution while others were not prosecuted, though they similarly were in violation of the law). Nevertheless, the majority opinion uses this en banc opportunity to look afresh at what the standard for discovery on a selective prosecution defense should be.

There is no question that selective prosecution claims of the sort we address today are deeply troubling. Such claims bring powerful interests into conflict: the nation's commitment to rid itself of drugs, on the one hand, and the individual's right not to be singled out for prosecution on account of race, on the other. They reflect concerns which are legitimate and widespread—and which I share—that mandatory minimum sentences in general, and those for crack offenses in particular, fall heavily on young black males.⁴ Such things are, however, up to the Congress and the United States Sentencing Commission. Our task is far more discrete, having to do only with the specific showing made by the defendants in this particular case, and being constrained by the difference between our role as judges and the role of the government as prosecutor, which the Supreme Court has admonished us to remember in the context of selective prosecution claims:

In our criminal justice system, the Government retains "broad discretion" as to whom to prosecute. "[S]o long as the prosecutor has probable

⁴ Data from the United States Sentencing Commission, for example, indicate that 87.9 percent of all those convicted for cocaine base offenses nationwide are African-American. *United States Sentencing Commission Annual Report 1993*, table 62.

cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

United States v. Wayte, 470 U.S. 598, 607, 105 S.Ct. 1524, 1530, 84 L.Ed.2d 547 (1985) (citations omitted).

In that light, I disagree with the majority that there is any call to revisit *Bourgeois*. There we held that

to obtain discovery on a selective prosecution claim, a defendant must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of government actors. This is a high

threshold. As has been true historically, it will be the rare defendant who presents a sufficiently strong case of selective prosecution to merit discovery of government documents.

964 F.2d at 939. *Bourgeois* is in the mainstream of the law,⁵ and appropriately balances the interests of

⁵ The First Circuit test for an evidentiary hearing is sufficient facts tending to show that the defendant has been selectively prosecuted and raising a reasonable doubt about the propriety of the prosecutor's purpose. *United States v. Penagaricano-Soler*, 911 F.2d 833, 838 (1st Cir.1990). The Third Circuit's test is "colorable entitlement to the defense of discriminatory prosecution. . . ." *United States v. Berrigan*, 482 F.2d 171, 181 (3rd Cir.1973). The Fifth Circuit's is "colorable claim of selective prosecution," *United States v. Kahl*, 583 F.2d 1351, 1355 (5th Cir.1978). The Sixth Circuit allows discovery where there is "some evidence tending to show the existence of the essential elements of the defense." *United States v. Adams*, 870 F.2d 1140, 1146 (6th Cir.1989). The Seventh Circuit's standard is a "colorable basis for the claim," which it defines as "some evidence tending to show the essential elements." *United States v. Heidecke*, 900 F.2d 1155, 1158-59 (7th Cir.1990). The D.C. Circuit requires a "colorable showing" of both elements. *Attorney General of the United States v. Irish People, Inc.*, 684 F.2d 928, 933 (D.C.Cir.1982), *cert. denied*, 459 U.S. 1172, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983).

The Fourth Circuit requires a nonfrivolous showing of both elements to merit discovery. At least a legitimate issue of improper governmental conduct must be raised, and in determining whether one has been, the district court may consider the government's explanation for its conduct. *United States v. Greenwood*, 796 F.2d 49, 52 (4th Cir.1986) (relying on *Wayte* dissent). The Eleventh Circuit's standard is "colorable entitlement" which will be met by evidence that is "past the frivolous state and raise[s] a reasonable doubt as to the prosecutor's purpose." *United States v. Gordon*, 817 F.2d 1538, 1540 (11th Cir.1987), *vacated on other grounds*, 836 F.2d

prosecutorial discretion and freedom from invidious discrimination. It correctly acknowledges that the threshold for discovery is high because the showing required on the merits of a selective prosecution defense is high.

A "high threshold" is appropriate because courts are ill equipped to assess a prosecutor's charging decisions, and oversight of prosecutorial decisions could undermine effective law enforcement. *Bourgeois*, 964 F.2d at 939-40; *Wayte*, 470 U.S. at 607-08, 105 S.Ct. at 1530-31. As we explained in *Bourgeois*:

We believe that this high threshold will discourage fishing expeditions, protect legitimate prosecutorial discretion, safeguard government investigative records, and yet still allow meritorious claims to proceed. This threshold also draws on the effectively high hurdle all the circuits have adopted, regardless of the phrasology of their standards. Our research of circuit court opinions uncovered only a handful of instances in the past few decades in which a defendant obtained discovery or dismissal of charges based on a selective prosecution claim. In those cases, the defendants presented solid, credible evidence in support of their claims.

964 F.2d at 940.

1312 (1988) (quoting *United States v. Hazel*, 696 F.2d 473, 475 (6th Cir.1983)).

The Second and Eighth Circuits require that a defendant make a prima facie showing before discovery can be ordered. *St. German of Alaska Eastern Orthodox Catholic Church v. United States*, 840 F.2d 1087, 1095 (2d Cir.1988); *United States v. Parham*, 16 F.3d 844, 846 (8th Cir.1994) (stating that the defendant's burden is a "heavy one").

The majority opinion nevertheless declares that the meaning of the *Bourgeois* standard is "elusive," and uses that excuse to rewrite the law. However, "colorable basis" as a standard is no more elusive than any other threshold standard. It is the standard most other circuits apply. Although there may be no way precisely to define it, I doubt that many judges would disagree that "colorable basis" is a lower level of specificity than a *prima facie* showing, but greater than an allegation. As *Bourgeois* indicates, it simply requires some specific facts—not allegations, speculation, conclusions, or questions—that are solid and credible enough to indicate that both elements of a selective prosecution defense exist.

While the majority opinion purports to clarify what "colorable basis" means, it actually crafts a new standard which is far more elusive than *Bourgeois*. It is variously described as "some evidence *tending* to show the essential elements of the claim," [p. 8a, *supra*], "more than frivolous and based on more than conclusory allegations," *id.*, more than "frivolous and unwarranted allegations," [p. 14a, *supra*], "some evidence that tends to show that the United States Attorney may be engaging in discrimination," [p. 21a, *supra*], and "evidence that reasonably permits one to find a colorable basis for concluding that race-based prosecutorial selection may have occurred." [P. 26a, *supra*]. To permit discovery on a showing that discrimination "may" have occurred in the absence of any facts tending to show that the defendant has been singled out for prosecution on account of race puts us out of line with all other circuits.⁶ To the extent that the new threshold is "more than frivolous and unwarranted allegations," it may well be "more akin"

⁶ See n. 16, *infra* at [61a-62a].

to that favored by two circuits and the dissent in *Wayte*, but is out of step with the others.⁷ *Bourgeois* is in line with the majority view, is faithful to the Supreme Court's admonitions in *Wayte*, and appropriately balances the interests at stake. We should, therefore, stick with it.⁸

III

We previously held in *Bourgeois*, 964 F.2d at 937, and the majority continues to hold, that a district court's decision to order or not order discovery is reviewed for abuse of discretion. While we should not substitute our judgment for that of the district court, we do reverse even under this deferential standard

⁷ See n. 5, *supra* at [42a-43a].

⁸ The majority opinion also appears to make the showing required—whatever its threshold—contingent on whether the facts that would establish a colorable basis are "easily obtainable" by defendants. [P. 12a, *supra*]. It does so by relying on the dissent in *Wayte*, 470 U.S. at 624, 105 S.Ct. at 1539. However, all that Justice Marshall said on this point was that a standard which requires a defendant to present "some evidence tending to show the existence of the essential elements of the defense" "recognizes that most of the relevant proof in selective prosecution cases will normally be in the Government's hands." *Id.* In no way did he suggest a moving target depending on "what evidence is readily available," as the majority opinion holds. [P. 12a, *supra*]. In any event, we have previously held that the fact that information might be helpful does not get defendants over the discovery hurdle. See *e.g.*, *United States v. Ness*, 652 F.2d 890, 892 (9th Cir.), *cert. denied*, 454 U.S. 1126, 102 S.Ct. 976, 71 L.Ed.2d 113 (1981). The showing required should be a colorable basis that discriminatory effect and intent exist; it should not vacillate depending upon whether counsel has access to more or less information, or how readily available the evidence is. See, *e.g.*, *United States v. Steele*, 461 F.2d 1148, 1151 (9th Cir.1972) (*Steele* himself located six other similarly situated persons who had not been prosecuted).

when the court either does not apply the correct law, or rests its decision on a clearly erroneous finding of material fact. *Marchand v. Mercy Medical Center*, 22 F.3d 933, 936 (9th Cir.1994).

IV

I would hold that the district court erred as a matter of law in concluding that Armstrong made a sufficient showing in the absence of any evidence that similarly situated non-black offenders were not prosecuted, and in the absence of any finding that the statistical pattern presented could be so stark, if fleshed out by discovery, as to be inexplicable on grounds other than intentional discrimination on the basis of race. The Supreme Court has made clear that unless there is an overtly discriminatory classification, which Armstrong does not claim in this case, a defendant is required to show both discriminatory effect and discriminatory intent in order to make out a defense of selection prosecution. *Wayte*, 470 U.S. at 608, 105 S.Ct. at 1531. Without any evidence of similarly situated offenders who share everything in common with the defendant except for the constitutionally impermissible factor, there can be no colorable basis for the existence of discriminatory selection or effect. Nor is there a colorable basis for the existence of discriminatory intent because intent to discriminate against black defendants cannot possibly be inferred from only a statistic that has no comparison pool, is statistically insufficient to suggest a pattern inexplicable save for race, and is in fact explained on grounds having nothing to do with race: that these defendants dealt in substantial quantities of crack, many times, using firearms; made threats; had prior drug and firearms convictions; and were caught in the act on tape.

While acknowledging that both discriminatory effect and discriminatory intent must be shown, the majority opinion effectively collapses the two by holding that "inadequately explained evidence of a significant statistical disparity in the race of those prosecuted suffices to show the colorable basis of discriminatory intent and effect that warrants discovery on a selective prosecution claim." [Pp. 10a-11a, *supra*]. In this it is incorrect: from the statistic in evidence, "statistical disparity" cannot be inferred. Even if it could be, the statistical disparity which could be inferred from 24 closed prosecutions against black defendants in one year and 11 opened cases involving non-black defendants over a four year period has no possibility of being "stark" enough to show discriminatory purpose when the government has offered legitimate, race-neutral reasons for prosecuting crack cases in general and the *Armstrong* defendants in particular.

A

We have held a number of times in a number of different cases that the first thing a defendant must show is that "others similarly situated have not been prosecuted. . . ." *United States v. Wayte*, 710 F.2d 1385, 1387 (9th Cir.1983), *aff'd*, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985), quoted in *Bourgeois*, 964 F.2d at 938. *Bourgeois* failed to establish a colorable basis for the first element of his claim because he made "no attempt to show that, in any span of time, the government has declined to prosecute similarly situated, non-black felons illegally in possession of firearms." *Id.* at 941. The majority opinion mistakenly distinguishes *Bourgeois* by emphasizing that it involved only one operation, over a single two-day period; in fact, *Bourgeois'* focus was on both the span

of time and scope necessary to have probative value and the lack of similarly situated prosecutions. In *United States v. Wilson*, 639 F.2d 500 (9th Cir.1981), the defendants claimed that they were singled out by the government because they were tax protesters. The evidence showed that out of 425 taxpayers who filed an "exempt" W-4 form the only two who were prosecuted were tax protesters; that an IRS investigator was unaware of any tax protestors who were not prosecuted for non-payment of taxes; and that others whose W-4 forms might bear investigation had not been prosecuted. We held that the evidence did not suffice for a selective prosecution claim as the defendants

have not shown, as the Oaks⁹ test requires, that other[s] similarly situated who have not exercised their rights have not been prosecuted. The statistics listed above show that there were other prosecutions and the Wilsons have not shown that those defendants were also tax protestors. This being so, we cannot find that the Wilsons carried their burden of proving that the decision to prosecute was made because they exercised their constitutional rights.

Id. at 504. In *United States v. Aguilar*, 883 F.2d 662 (9th Cir.1989), *cert. denied*, 498 U.S. 1046, 111 S.Ct.

⁹ The reference is to *United States v. Oaks*, 527 F.2d 937 (9th Cir.1975), *cert. denied*, 426 U.S. 952, 96 S.Ct. 3177, 49 L.Ed.2d 1191 (1976). *Oaks* held that "[t]o sustain a claim of selective or discriminatory prosecution, a defendant bears the burden of proving first that 'others similarly situated generally have not been prosecuted' for similar conduct, and second that 'his selection was based on an impermissible ground such as race, religion or his exercise of his first amendment right to free speech.'" *Id.* at 940, quoting *United States v. Scott*, 521 F.2d 1188 (9th Cir.1975).

751, 112 L.Ed.2d 771 (1991), we upheld the district court's denial of defendants' request for discovery and an evidentiary hearing on their motion for dismissal based upon selective prosecution because the defendants' suggested definition of those similarly situated excluded the most relevant analogous class. Stating that "[a]bsent a similarly situated control group, the government's prosecution of a defendant exercising his constitutional rights proves nothing," *id.* at 706, we joined the D.C. Circuit in the understanding that "[d]iscrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances." *Id.*, quoting *Attorney General of the United States v. Irish People, Inc.*, 684 F.2d 928, 946 (D.C.Cir.1982), *cert. denied*, 459 U.S. 1172, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983). Accordingly, we held that "if similarly situated persons are being prosecuted then appellants fail to make the required showing." *Id.* Likewise in *United States v. Gutierrez*, 990 F.2d 472 (9th Cir.1993),¹⁰ we affirmed the district court's failure to

¹⁰ Although the majority purports to overrule *Gutierrez* to the extent that it is inconsistent with the opinion's view that "statistical disparities alone may suffice to provide the evidence of discriminatory effect and intent that will establish a prima facie case of selective prosecution," [p. 10a, *supra*], n. 1, I believe *Gutierrez* remains good law in part because I wrote it, and in part because I question the license of an en banc court considering a *discovery* issue to overrule the standard for prevailing on the *merits*. *Discovery* cannot be unhinged from the *merits*; retroactively to change the *merits* standard to facilitate *discovery* is to put the cart before the horse. It is all the more remarkable to do so with respect to a decision that was not taken en banc, and that is consistent with all prior authority in this circuit, as well as others, *see, e.g.*, *Irish People*, 684 F.2d 928; *United States v. Huff*, 959 F.2d 731, 735 (8th Cir.) (statistics showing 87% of people arrested are

grant a motion to dismiss for selective prosecution on charges of distributing cocaine base within 1000 feet of a school because “[s]tatistics showing a high percentage of certain groups being prosecuted, alone, are insufficient to establish that similarly situated persons are not being prosecuted.” *Id.* at 476. And in *Ness*, we considered a showing quite similar to *Armstrong’s* and held with respect to *Ness’s* showing:

While he showed that similarly situated members of his tax protest group had also been prosecuted, *Ness* did not show a single instance of a similarly situated but nonprotesting violator who had not been prosecuted. The fact that access to the Government’s files might be helpful to a defendant seeking to prove discriminatory prosecution does not relieve him of the burden of making an initial showing, nor does that fact, in itself, entitle every defendant raising such a claim to discovery.

652 F.2d at 892.

Thus it is well settled: to succeed on a claim of selective prosecution, a defendant has the burden of *establishing* that others similarly situated have not been prosecuted. The burden for purposes of discovery is substantively the same, only it is met by showing a *colorable basis* that others similarly situated have not been prosecuted.¹¹ As the panel explained:

African-Americans insufficient to establish prima facie case), *cert. denied*, — U.S. —, 113 S.Ct. 162, 121 L.Ed.2d 110 (1992).

¹¹ This view is in accord with all other circuits to have considered the question. *See, e.g., Irish People*, 684 F.2d at 946 (reversing discovery order; no evidence others weren’t

Requiring defendants to provide a colorable basis for believing that others similarly situated have not been prosecuted is a reasonable requirement. “Selective prosecution” implies that a selection has taken place. If a defendant is part of a protected class, that alone does not provide a colorable basis for believing that a selection has taken place; nor does evidence demonstrating that other members of the protected class were prosecuted provide a colorable basis for so believing. Rather, a defendant must supply a colorable basis for believing that others similar to him except that they are not in his protected class were not prosecuted. Without a colorable basis to believe that others similarly situated were not prosecuted, the most reasonable conclusion is that the defendant was selected for prosecution because the government believed the defendant committed the offense; the fact that the defendant is a member of a protected class is coincidental.

Armstrong, 21 F.3d at 1436-37.¹²

prosecuted); *Kahl*, 583 F.2d at 1353 (discovery denied; no showing that the government didn’t prosecute others similarly situated); *Parham*, 16 F.3d at 847 (no threshold showing because of absence of evidence that other’s acts of ballot fraud were tolerated without prosecution); *United States v. Larson*, 612 F.2d 1301, 1305 (8th Cir.) (no prima facie case; no showing that others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted), *cert. denied*, 446 U.S. 936, 100 S.Ct. 2154, 64 L.Ed.2d 789 (1980); *cf. Hazel*, 696 F.2d at 475 (arguably asserting that 34 other members of tax revolt group had not been prosecuted suffices for first prong); *Greenwood*, 796 F.2d at 52 (discovery denied; contention that five similarly situated white agents were not prosecuted groundless).

¹² In *Irish People*, the D.C. Circuit similarly concluded that “it makes sense to require a colorable claim of both [parts of the

Armstrong's showing lacks any specific evidence that the government has failed to prosecute similarly situated non-blacks, or that any similarly situated non-black cocaine base offender was not chosen for federal prosecution but was left to be prosecuted in state court. Evidence that all 24 crack cases closed by the Federal Public Defender in 1991 involved black defendants is a meaningless number without some pool against which to measure it. It shows only that blacks have been prosecuted, not that others similarly situated who are not black have not been prosecuted. The study says nothing about cases that were *opened* by the FPD during the period its closed

two-element test for selective prosecution] before subjecting the Government to discovery," explaining:

Defendant must make a colorable showing that he has been especially singled out, that there exist persons similarly situated who have not been prosecuted. Without such a showing, it is irrelevant that the British or Irish may also have wanted the suit brought.

... It is clear ... that a demonstration of selection is indispensable for the defense and that the burden of so demonstrating lies squarely on the defendant.

....

... Where defendant cannot show anyone in a similar situation who was not prosecuted, it has been held that he has not "met even the threshold point of the *Yick Wo* doctrine—'official discrimination ... between persons in similar circumstances, material to their rights. ...'"

684 F.2d at 946-47. See also *Kerley*, 787 F.2d at 1150 (to discover government documents defendant must introduce some evidence tending to show the existence of the essential elements of the defense, including that he was singled out for prosecution while others similarly situated haven't been).

cases were active.¹³ (Although that would come closer to a valid sample, there is no basis in the record for extrapolating from the Federal Public Defender's study a figure representative of all relevant defendants prosecuted in the Central District.) Nor does the statistic speak to whether the Federal Public Defender had other cases involving non-black defendants that were opened during the same period that cases closed in 1991 were opened (1988-1991). Indeed, the government's evidence that during this period at least two non-black defendants were prosecuted who were represented by the FPD, and two others were prosecuted who were not represented by the FPD, is uncontradicted. It is no answer to suggest, as Armstrong and the majority do, that the government's evidence is irrelevant because it is outside the defendant's study: the *court* must identify an appropriate comparison group, *Aguilar*, 883 F.2d at 706, and by definition, the appropriate population. In any event, the FPD study is only relevant to the extent that it accurately represents the universe of prosecutions.¹⁴ There can

¹³ The majority opinion's statement that "the factor used to choose the cases examined in the study—whether the case had been closed—was a factor independent of and not correlated with race," [p. 20a, *supra*], n. 7, is without any support in the record. It could as well be said—equally without any support in the record—that the reason closed cases instead of opened cases was chosen was because (as the government's evidence shows) non-blacks were prosecuted in cases that were opened during 1988-1991 but were closed in some year other than 1991.

¹⁴ The majority opinion "fail[s] to see the difference" between cases closed and cases opened. [p. 20a, *supra*, n. 7. They are, of course, opposite sides of the same coin. Whether looked at through the lens of "opened" or "closed," the number of black defendants prosecuted on crack charges, standing alone as it does here without reference to whether non-black

be no serious question that evidence of prosecutions which were actually brought is more on target than a study of a small sample of closed cases that is not random and is biased by the composition (indigent defendants only) of the FPD's clients. Among other things, the government's evidence shows that charges were filed against seven non-black defendants in 1992—the same year that the *Armstrong* defendants were indicted. That is the only evidence in the record about what went on in the specific year of the prosecution in this case. Without putting too fine a point on it, that fact cannot be discounted as immaterial.

In addition, there is no indication that any of the defendants in the 24 cases encompassed by the FPD

crack dealers who sold large quantities and used firearms and had priors and were caught in the act on tape were not prosecuted, has no tendency to prove the elements of selective prosecution. However, on the theory adopted by the majority opinion—that the number prosecuted is alone sufficient—it does make a difference whether the focus is on cases opened or cases closed. The opinion fixes only on the closed aspect of the closed cases in the FPD study, whereas the government's evidence focuses, correctly, on the opened aspect of the closed cases as well as others which were prosecuted against non-black defendants who were either not represented by the FPD at all or at least not in cases that were closed in 1991. Cases closed can't have any tendency to prove discrimination except to the extent that they show what cases were brought, or opened, and thus what was motivating the United States Attorney's Office when it decided to file charges against *Armstrong*. The cases closed in 1991 were indicted in 1988, 1989, 1990, and 1991. The evidence shows that non-black defendants were also indicted during that period. Thus, contrary to the majority opinion, the government's showing directly rebuts both the "accuracy" of the study (to the extent that accuracy is in issue, which it really isn't) and its probative value on the elements of selective prosecution (which is in issue).

study were similarly situated to the defendants in this case. All of the *Armstrong* defendants are charged with conspiring to distribute cocaine base using an armed guard, and four of the five are charged with a firearms violation. The population in the FPD study is crack offenders—not crack offenders who committed cocaine base offenses while possessing firearms. As the discovery ordered is of prosecutions for both crack and firearms offenses, there is no basis in the statistical evidence for finding that the discovery ordered is relevant. In addition, the study concerns only those defendants who were prosecuted in 1991 or before. Thus, the study population does not include *Armstrong* and cannot mean anything so far as *these* defendants are concerned. An inference of discrimination against these defendants can therefore not arise even if the statistic could imply discrimination against crack defendants whose cases were closed by the FPD in 1991.

For these reasons, the only statistic in evidence affords no basis for inferring the existence of discriminatory selection, or effect. The mere fact that all the offenders share the same trait (*i.e.*, are black) cannot prove that this trait was the motivation for selecting them for prosecution unless other similar offenders who do not possess that trait were not selected. The FPD study shows nothing more than the fact that all persons it represented in cases closed in 1991 shared the common trait of being black; it sheds no light on whether the government discriminated as there is no showing that those without the trait were, or would be, treated differently.

Armstrong also relies on the *Los Angeles Times* article and two declarations presented in connection with the government's motion for reconsideration.

One is counsel's declaration that an Impact House employee told her that in his experience dealing with crack addiction, there are an equal number of caucasian and black users and dealers; the other is another counsel's declaration that he had never heard of non-blacks being prosecuted in federal court whereas they were in state court. It is unclear that the district court relied on anything other than the FPD study, as it made no reference to the declarations and said it found nothing of value in the newspaper article. Regardless, assuming that it was proper for the court to consider the declarations in connection with a discovery request even though both were hearsay, neither declaration sets out any specific fact or credible evidence of the existence of discriminatory effect or intent. Counsel's declaration about not having heard of non-blacks being prosecuted in federal court is entitled to no weight in light of the government's evidence that non-blacks were in fact prosecuted; his further statement that "many" crack cocaine sales cases prosecuted in state court involve racial groups other than blacks lacks any relevant force because it can't be determined whether they are similarly situated in any respect to the *Armstrong* defendants. By the same token, Impact House is a residential drug treatment center; it houses addicts, not dealers unless they are also addicts, and nothing in the declaration suggests that the intake coordinator's experience is with offenders who are similarly situated to the *Armstrong* defendants.

In sum, there is no indication that the government has not prosecuted similarly situated non-black offenders. However, even if an inference of disproportionate impact for purposes of selective prosecution could be drawn, Armstrong's evidence does

not establish a colorable basis that he was prosecuted because of his race.

B

"'Discriminatory purpose' . . . implies more than . . . intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Wayte*, 470 U.S. at 610, 105 S.Ct. at 1532 (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979)). Nothing in the record indicates that the government impermissibly targeted blacks for prosecution or acted improperly in bringing the *Armstrong* indictment; to the contrary, there is evidence that the government made its charging decision in *Armstrong* based on the quantity of drugs involved, the number of sales and defendants, involvement of a federal agency concerned with firearms in the investigation, multiple firearms violations intertwined with the narcotics trafficking, strength of the evidence (including tapes), the making of threats, and criminal histories having to do with both drugs and firearms. These are the very factors identified by the Supreme Court in *Wayte* that courts must hesitate to examine because they are intrinsic to prosecutorial discretion. 470 U.S. at 607, 105 S.Ct. at 1530.

Armstrong argues, however, that a prima facie case of purposeful discrimination may be made by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. He submits that intent may be found even though there is no evidence that the government is hostile to the group, and the government gives a race-neutral explanation for its

action, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); that intent may be proved circumstantially, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 563-64, 50 L.Ed.2d 450 (1977); and that circumstantial evidence of discriminatory intent may include proof of disparate impact, *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 2048-49, 48 L.Ed.2d 597 (1976). I agree, in the abstract. In limited circumstances "a clear pattern, unexplainable on grounds other than race" may be "stark" enough to infer intent, but such cases are "rare." *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 563-64, *McCleskey v. Kemp*, 481 U.S. 279, 293 n. 12, 107 S.Ct. 1756, 1767 n. 12, 95 L.Ed.2d 262 (1987).¹⁵ Here, the record consists of the FPD study, which shows that in 24 cases prosecuted from 1988-1991 and closed by the Federal Public Defender in 1991 the defendant was black; the government's proffer that 11 non-black defendants were prosecuted during the period these cases were opened and Armstrong was indicted; and evidence that the *Armstrong* defendants were charged because of the severity of their criminal activity. In no way is this a "stark" statistical pattern, unexplainable or unexplained on grounds other than race. The statistic alone cannot, therefore, support any inference of intent.

¹⁵ Jury-selection cases, *see, e.g., Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), are somewhat of an exception because of the nature of the task, *McCleskey*, 481 U.S. at 293 n. 13, 107 S.Ct. at 1768 n. 13, but they are inapposite for the additional reason that the statistics in those cases show a disparity between the population and those summoned for duty. As there is no comparison group here, no disparity can be shown.

This is clear from comparing the two cases where the Supreme Court has seen impact alone as determinative, *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), and *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). In each, the pattern was "stark," *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 563-64, and in each, the complaining parties demonstrated the existence of similarly situated persons who were treated differently. In *Gomillion*, when the state legislature redrew the boundaries of the City of Tuskegee from a square into a 28-sided figure, the effect was "to remove from the city all save for only four or five of its 400 Negro voters while not removing a single white voter or resident." *Gomillion*, 364 U.S. at 341, 81 S.Ct. at 127. In *Yick Wo*, San Francisco had enacted an ordinance banning the use of wood buildings for laundries in the absence of consent by the Board of Supervisors. There were about 320 laundries in the city of which 310 were wood, 240 were owned by Chinese, and 80 were owned by non-Chinese. One hundred fifty Chinese operators were arrested for operating a laundry in violation of the ordinance, while no non-Chinese operators were arrested. Two hundred Chinese owners petitioned for consent from the Board, and all their petitions were denied; of the non-Chinese owners, all but one was granted. Thus, unlike this case, in *Gomillion* and *Yick Wo* there was an identifiable pool against which comparisons could be made, and that comparison showed such dramatic disparities in how the groups were treated that the "conclusion was irresistible, tantamount for all practical purposes to a mathematical demonstration," *Gomillion*, 364 U.S. at 341, 81 S.Ct. at 127, that the state acted with discriminatory intent.

Given the absence of any evidence about any comparison group in this case, and thus of any possible statistical disparity in how different classes are treated, there is no way under existing law that the evidence in this case establishes a colorable basis for the existence of discriminatory intent.

C

The majority opinion's logic flows from its assumption that "statistical disparities alone may suffice to provide the evidence of discriminatory effect and intent that will establish a prima facie case of selective prosecution." [P. 10a, *supra*]. For this it relies on *Redondo-Lemos*, 955 F.2d at 1301-02. However, what Judge Kozinski actually wrote is that, in connection with the *discriminatory effect* prong, "[a]t a threshold level, whether or not there is a significant disparity in the treatment of classes of defendants can normally be determined on the basis of statistical evidence." *Id.* at 1301. *Redondo-Lemos* does not say that any statistic is a statistical disparity, or that a statistical *disparity*, if it does exist, proves intent no matter what its significance. Nevertheless, the majority's opinion makes a statistic—which is all there is in this case—into a "statistical disparity"; then makes a "statistical disparity"—no matter how significant—into a prima facie showing; then asserts that the standard for discovery is lower than a prima facie showing; then holds that "inadequately explained evidence of a significant statistical disparity" suffices to show a colorable basis of discriminatory intent and effect. [Pp. 10a, 11a, *supra*]. This syllogism simply is not the law. Statistics have to be measured against something, otherwise there can be no "disparity"

because there is nothing from which to deduce a difference.

Of the need to show that others similarly situated have not been prosecuted, the opinion first says the obvious: "a defendant is not required to *demonstrate* that the government has failed to prosecute others who are similarly situated. He need only provide a *colorable basis* for believing that other similarly situated persons have not been prosecuted." *Id.* at 1516. Then the opinion comes full circle by concluding that the FPD study "clearly satisfies this requirement" because "[a]t a threshold level, whether or not there is a significant disparity in the treatment of classes of defendants can normally be determined on the basis of statistical evidence, without reference to the underlying facts of individual cases." *Id.* This doesn't follow as a matter of fact, or as a matter of law.¹⁶

¹⁶ There has been evidence of disparity (not just a study of numbers prosecuted) in each of the few cases in which a finding of selective prosecution or an order for discovery has been upheld on appeal. See, e.g., *Steele*, 461 F.2d at 1151 (conviction reversed; defendant located and presented evidence of six other persons who, like him, had refused on principle to complete census forms but who, unlike him, had not taken a public stand against the census and had not been prosecuted); *Adams*, 870 F.2d at 1146 (discovery ordered; record suggests that taxpayers who underreport income and voluntarily amend returns and pay deficiency, as defendants did, have not been prosecuted, though defendants were); *Gordon*, 817 F.2d at 1540 (colorable entitlement shown and discovery and evidentiary hearing affirmed; magistrate judge found that defendants presented some evidence of similar violations by other persons who have not been prosecuted); cf. *United States v. Berrios*, 501 F.2d 1207, 1211-12 (2d Cir.1974) (declining to reverse order for hearing and production of government memorandum in camera based on counsel's affidavit that hundreds of other union officials had prison

Perhaps recognizing this, the majority opinion reveals in a footnote what its real holding is: "no 'comparison pool' is necessary when the record contains statistical evidence tending to show that only members of racial or ethnic minority groups have been prosecuted. Were we to conclude otherwise, we would be accepting unwarranted racial stereotypes." [P. 19a, *supra*], n. 6. For this there is

records and only three had been prosecuted, but indicating that, to show a "colorable basis" for discovery "we would first require some evidence tending to show the existence of the essential elements of the defense" and characterizing existence of unprosecuted violations of statute defendant was prosecuted under as an "essential element"); *United States v. Cammisano*, 413 F.Supp. 886 (W.D.Mo.1976), *vacated on other grounds*, 546 F.2d 238 (defendants demonstrated many persons in apparently similar circumstances who violated Federal Meat Inspection Act, but who have not been prosecuted). In addition, in all but *Berrios*, there was direct evidence that the prosecution was brought for an impermissible reason. In *Steele*, the government admitted that it was concerned about census protestors and provided no non-discriminatory explanation for prosecuting Steele; in *Gordon*, a Department of Justice official said that the voting fraud investigation was brought about by "arrogance on the part of the blacks"; in *Adams*, a government official acknowledged that the defendant was prosecuted as "revenge" for her filing an EEOC claim; and in *Cammisano*, an FBI agent threatened defendant. By the same token, district court orders for discovery which have *not* been based on a finding that others similarly situated have not been prosecuted have been reversed. See, e.g., *Wayte*, 710 F.2d at 1387 (reversing discovery order on the footing that Wayte had not shown he was selected from the larger group because of his exercise of constitutional rights, but noting that the first element had been established because the district court had found that over 500,000 eligible men had not registered for the draft whereas only 12 others in addition to Wayte had been indicted for failure to register, all of whom were vocal nonregistrants); *Kerley*, 787 F.2d at 1150; *Irish People*, 684 F.2d at 946.

absolutely no authority. The need to identify similarly situated persons who have not been prosecuted does not evaporate when race is advanced as the constitutionally impermissible factor; rather, some evidence of those who are similarly situated except for the constitutionally impermissible factor but were not prosecuted is necessary in order to show that the defendant, who has that trait, has been prosecuted selectively. The issue is not prosecution, but *selective* prosecution, and there can be no *selective* prosecution without selection of the particular defendant for prosecution because of the constitutionally impermissible factor.

The majority opinion then holds that the government must explain "evidence of a significant statistical disparity." [P. 11a, *supra*]. There are two problems with this step. First, the FPD study does not show "significant" statistical "disparity." It is not a random sample in which every case has the same chance of being selected, nor is a sample of 24 cases indicted over four years but closed in a single year large enough, or representative enough, to say (or surmise) anything meaningful about the history of crack prosecutions in the Central District. The second, and more important problem lies in the fact that the opinion regards the government's explanation in this case as unpersuasive, and in so doing, essentially holds that the defendant's statistical showing cannot be explained without the full disclosure that the discovery requested would entail.¹⁷ While the government *may* offer an

¹⁷ In this connection, the majority opinion asserts that the government's response "does not speak to the inference that blacks are more frequently prosecuted for *federal* crack offenses than even their allegedly disproportionate involvement with the drug would justify." [P. 22a, *supra*]. The

explanation and if it does, that explanation should be considered, there is no precedent that it must make any explanation or carry any burden at the discovery stage. In any event, imposing such a burden on the government provides the next building block for the opinion, which then says: "In the absence of a response undermining the study's accuracy, the district judge appropriately gave credence to the defendants' showing that a study of federal cocaine base cases *closed* by the federal public defender over a particular period of time showed that *only* black

assertion implies that the response somehow should have spoken to the issue of state and federal prosecutions and is deficient because it didn't. This is incorrect because the *defendants'* showing says nothing about state and federal prosecutions of similarly situated offenders so there is nothing to respond to. More important, it slides into the balance of whether discovery should be ordered a consideration federal courts of appeal—including ours—have uniformly rejected as implicating equal protection: the fact that higher federal sentences for cocaine base offenses fall disproportionately on blacks. *United States v. Singleterry*, 29 F.3d 733 (1st Cir.), *cert. denied*, — U.S. —, 115 S.Ct. 647, 130 L.Ed.2d 552 (1994); *United States v. Frazier*, 981 F.2d 92 (3rd Cir.1992), *cert. denied*, — U.S. —, 113 S.Ct. 1661, 123 L.Ed.2d 279 (1993); *United States v. D'Anjou*, 16 F.3d 604 (4th Cir.), *cert. denied*, — U.S. —, 114 S.Ct. 2754, 129 L.Ed.2d 871 (1994); *United States v. Galloway*, 951 F.2d 64 (5th Cir.1992); *United States v. Reece*, 994 F.2d 277 (6th Cir.1993); *United States v. Chandler*, 996 F.2d 917 (7th Cir.1993); *United States v. Lattimore*, 974 F.2d 971 (8th Cir.1992), *cert. denied*, — U.S. —, 113 S.Ct. 1819, 123 L.Ed.2d 449 (1993); *United States v. Coleman*, 24 F.3d 37 (9th Cir.), *cert. denied*, — U.S. —, 115 S.Ct. 261, 130 L.Ed.2d 181 (1994); *United States v. Easter*, 981 F.2d 1549 (10th Cir.1992); *United States v. King*, 972 F.2d 1259 (11th Cir.1992), *cert. denied*, — U.S. —, 113 S.Ct. 2448, 124 L.Ed.2d 665 (1993); *United States v. Thompson*, 27 F.3d 671 (D.C.Cir.), *cert. denied*, — U.S. —, 115 S.Ct. 650, 130 L.Ed.2d 554 (1994).

defendants were involved." [P. 20a, *supra*]. Yet the study's *accuracy* is not at issue; its significance is. If a district court may credit a showing that cases closed by the FPD over a "particular" period of time involved only black defendants despite contrary evidence with respect to cases opened during the same period, there is no reason that a showing that cases closed in any "particular period of time"—one month, one week, or the two-days we rejected in *Bourgeois*—should not suffice, regardless of how many cases the attorney handles or how many others, similarly situated to the defendant but for race, were actually prosecuted during a reasonable period of time.

The majority opinion shifts the burden to the government in another respect that is unprecedented as well. It first assumes that "[g]iven the prevalence of all kinds of drugs throughout our community, at least *some* crack distributors are likely to be non-blacks." [P. 19a, *supra*]. This is probably correct, but is speculation nonetheless which has no basis in the record. From this premise, however, the opinion creates a presumption: "We must start with the presumption that people of *all* races commit *all* types of crimes—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group." *Id.* Although "[t]hese presumptions and premises are, of course, not conclusive," *id.*, the opinion gives no clue as to what they are to prove, or how they are to be disproved. Because the opinion finds that the government's identification of some non-black crack offenders who have been charged does not undermine the force of the FPD study, [pp. 18a-19a, *supra*], apparently the presumption cannot be overcome by a showing that of "some crack distributors [who] are likely to be non-

blacks," *some* have been prosecuted. If that is so, it is unclear to me that the "presumption" is rebuttable at all. Nor does the opinion suggest why such a "presumption" is needed; the party who seeks to use statistics must show what the comparison pool looks like. Moreover, to the extent that this "presumption" is intended to suggest that the government has some obligation to charge equal numbers, or proportionate numbers, of black and non-black offenders—or explain why not, it turns the law of selective prosecution on its head. The government has the right to be selective about whom it prosecutes, so long as it does not select *this* defendant *because* of a constitutionally impermissible factor. *Wayte*, 470 U.S. at 610, 105 S.Ct. at 1532. Indeed, instead of flipping the burden as the opinion appears to do, we have previously recognized that the defendant's showing has to be considered "in light of the presumption of prosecutorial propriety." *United States v. One 1985 Mercedes*, 917 F.2d 415, 421 (9th Cir.1990) (denying discovery because defendant had failed to produce evidence of improper government motivation sufficient to justify discovery in light of the presumption of prosecutorial propriety and the two-prong requirement of vindictive prosecution, the same as for selective prosecution).

If the majority opinion remains the law, it will be at no small cost. In this case alone, locating more than 3000 files and figuring out which were crack and firearms prosecutions, the racial identity of each defendant (presumably from the Presentence Report, because the United States Attorney's Office has no records of race), and the investigating authorities will be a time-consuming and expensive process. The opinion is, of course, license for the same fishing expedition in legions of other cases. If a raw

number—the number of cases prosecuted—suffices for discovery, I would suppose that discovery could be called for in virtually every case. For example, 100% of antitrust convictions are of white males. *United States Sentencing Commission, Annual Report 1991*, tables 16 and 17. Of pornographers, 92.6% are caucasian. *Id.*, table 16. Men comprise 83.3% of all those convicted of all federal crimes. *Id.*, table 17. And so on.

Resources intended for controlling crime, one of the nation's most pressing concerns, will be chasing statistics instead. With the prospect of having to fight discovery and justify every charging decision, it will not be surprising for crack prosecutions to wane. *That* will disserve those who suffer from what the *Los Angeles Times* has just called "the plague [that] destroyed dreams, lives and families." *Los Angeles Times*, Dec. 21, 1994, at A1 (headline). The opinion will also force the government to keep statistics on race, turning the focus from race-neutral to race-numbered prosecutions. *That* is a step backwards toward race-conscious decisions.

This is not what we, or any other circuit, have permitted until now. If there are specific facts which afford a colorable basis for finding that discriminatory effect and discriminatory intent exist, the costs are worth it. Race cannot determine whether one is prosecuted or not. But, sound policy as well as separation of powers constraints demand that there be a meaningful threshold before the courts may authorize an intrusion into the discretionary workings of our co-equal branch. For these reasons, I cannot join the majority opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 93-50031, 93-50057

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*CHRISTOPHER LEE ARMSTRONG,
AKA: CHRIS ARMSTRONG, DEFENDANT
andROBERT ROZELLE, AARON HAMPTON;
FREDDIE MACK; SHELTON AUNTWAN MARTIN,
DEFENDANTS-APPELLEES

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*CHRISTOPHER LEE ARMSTRONG,
AKA: CHRIS ARMSTRONG, DEFENDANT-APPELLEEAppeal from the United States District Court for the
Central District of CaliforniaBefore: HARLINGTON WOOD, Jr.,* REINHARDT,
and RYMER, Circuit Judges.

* Honorable Harlington Wood, Jr., Senior United States Circuit Judge, Seventh Circuit Court of Appeals, sitting by designation.

ORDER

The opinion and dissent filed January 21, 1994, slip op. 599, and appearing at 14 F.3d 1387 (9th Cir.1994), are withdrawn. A new opinion and dissent are filed in their place, and the petitions for rehearing and suggestions for rehearing en banc are dismissed as moot without prejudice.

OPINION

HARLINGTON WOOD, Jr., Senior Circuit Judge:

A federal grand jury indicted defendants Christopher Armstrong, Aaron Hampton, Freddie Mack, Shelton Martin, and Robert Rozelle for conspiring to distribute cocaine base in violation of 21 U.S.C. § 846 (1988). Some of the defendants also were indicted on substantive cocaine base charges under 21 U.S.C. § 841(a)(1) (1988), and using a firearm in connection with drug trafficking under 18 U.S.C. § 924(c) (1988 & Supp. III 1991). The defendants moved for discovery on whether the government selected the defendants for prosecution because of their race, and the district court granted the motion. After denying the government's motion to reconsider, the district court dismissed the indictments as a sanction for failure to comply with the discovery order, but stayed the execution of the dismissals pending appeal by the government.

We have jurisdiction to hear the government's appeal from the final judgment of the district court pursuant to 28 U.S.C. § 1291 (1988) and 18 U.S.C. § 3731 (1988). For the reasons stated, we reverse.

I. FACTUAL BACKGROUND

A task force composed of Inglewood Narcotics Division detectives and Bureau of Alcohol, Tobacco, and Firearms (ATF) agents used three confidential

informants from February through April of 1992 to infiltrate a cocaine base¹ distribution ring. On seven occasions from February 13, 1992, to April 6, 1992, the informants purchased cocaine base totalling approximately 124.3 grams from the defendants. The informants also reported the use of multiple firearms by the defendants during the sales.

On April 8, 1992, task force police executed search warrants on the hotel room in which the informants made their purchases, as well as on residences belonging to some of the defendants. The officers arrested defendants Armstrong and Hampton in the hotel room, discovering 9.29 additional grams of cocaine base and a loaded gun. The officers subsequently arrested defendants Mack, Martin, and Rozelle pursuant to bench warrants the district court issued. Ultimately, the task force police seized multiple firearms and approximately 135 grams of cocaine base as a result of the investigation. All of the defendants are black.

The government sought indictments against all defendants in federal court. On April 21, a grand jury indicted all defendants for conspiracy to distribute cocaine base under 21 U.S.C. § 846. The indictment also charged some defendants with substantive cocaine base violations of 21 U.S.C. § 841(a)(1), and usage of a firearm in connection with drug trafficking in violation of 18 U.S.C. § 924(c). The federal statutes at issue provide for more stringent penalties than their California counterparts.²

¹ Cocaine base is known more commonly as "crack" cocaine.

² Under 21 U.S.C. § 841(b) (1988 & Supp. III 1991), persons selling 50 grams or more of a mixture or substance containing cocaine base in violation of 21 U.S.C. § 841(a) must be imprisoned for at least 10 years and no more than life. Conspiracy, governed by 21 U.S.C. § 846, imposes the same

On July 20, 1992, defendant Martin filed a Motion for Discovery and/or Dismissal of Indictment for Selective Prosecution, claiming that the government was prosecuting him because of his race. Defendants Armstrong, Mack, Hampton, and Rozelle all timely joined defendant Martin's motion. The district court held a hearing on the motion on September 8, 1992.

At the hearing, the defendants offered as evidence of selective enforcement an affidavit from a paralegal employed by the Office of the Federal Public Defender. The affidavit, which included a statement and a chart, asserts that in the 24 cases closed by the Federal Public Defender's Office in 1991 involving cocaine base violations of 21 U.S.C. § 841 and/or 21 U.S.C. § 846, the defendant in each case was black. The defendants for some reason did not offer an affidavit from the Federal Public Defender or any supervising attorney, or for that matter any other evidence at all, but instead relied solely on the affidavit from the paralegal employee. As a result, the government contended that the defendants failed to meet the showing required to compel discovery.

Nevertheless, on September 8, 1992, the district court disagreed with the government and granted the motion for discovery on the issue of selective prosecution. The district court ordered the government

penalty range as the § 841(a) violation. 18 U.S.C. § 924(c) imposes an additional, consecutive 5-year sentence without parole for the usage or carrying of a firearm during and in relation to any drug trafficking crime, as well as mandating longer sentences for repeat violations and more dangerous weaponry. California law, on the other hand, provides for a 3, 4, or 5-year sentence for cocaine base offenders, Cal. Health & Safety Code § 11351.5 (Deering 1993), and if firearms are involved, also provides for a 2, 3, or 4-year sentence, *id.* § 11370.1.

to: (1) provide a list of all cases from the prior three years in which the government charged both cocaine base offenses and firearms offenses; (2) identify the race of the defendants in those cases; (3) identify whether state, federal, or joint law enforcement authorities investigated each case; and (4) explain the criteria used by the U.S. Attorney's Office for deciding whether to bring cocaine base cases federally.

On September 16, 1992, the government filed a motion for reconsideration of the discovery order. In support of its motion for reconsideration, the government submitted sworn declarations of a Special Agent of the Drug Enforcement Administration with 21 years experience, a Special Agent of the Bureau of Alcohol, Tobacco, and Firearms with three years experience at the ATF and another three years as a narcotics officer, a narcotics detective from the Inglewood Police Department with 10 years on the force and three years experience in the narcotics unit, and two experienced Assistant United States Attorneys stating that: (1) the Office of the Federal Public Defender represented at least five non-black cocaine base defendants during the relevant time period; (2) the government prosecuted many non-black cocaine base defendants during 1991, the period at issue in the report prepared by the paralegal employed by the Office of the Federal Public Defender; (3) the county district attorney's offices prosecute many black cocaine base offenders; (4) the government based its decision to charge on the existence of federal firearms and narcotics violations that met the guidelines of the United States Attorney's Office, the strength of the evidence, the deterrence value, the federal interest, the suspects' criminal history, and other race-neutral criteria; and

(5) socio-economic factors account for the prevalence of drugs in certain communities, as illustrated by black gangs in the south-central Los Angeles area predominantly controlling the supply of cocaine base.

In response to the government's motion for reconsideration, the defendants offered two additional declarations. The first, made by one of the defense attorneys, states that she had spoken with a halfway house intake coordinator who told her that in his experience in treating cocaine base addiction, the number of Caucasian and minority users and dealers is equal. The other declaration, made by another defense attorney, asserts that (1) he has represented only blacks in federal court on cocaine base charges; (2) he has never heard of non-blacks being prosecuted in federal court on cocaine base charges; and (3) in his conversations with unnamed state court judges, prosecutors, and defense attorneys, he has come to believe that the state prosecutes many non-black cocaine base offenders in state court. The defendants also submitted an article from the *Los Angeles Times*, which contends that blacks disproportionately commit cocaine base offenses. See Jim Newton, *Harsher Crack Sentences Criticized as Racial Inequality*, *Los Angeles Times*, Nov. 23, 1992, at A1, A20.

After a hearing on the motion for reconsideration, on December 29, 1992, the district court denied the motion. The government notified the district court on January 5, 1993 of its intention to challenge the discovery order and the denial of the reconsideration motion. As a sanction for failure to comply with the order, the district court dismissed the indictments of all defendants. The district court stayed the execution of the dismissals pending this appeal.

II. DISCUSSION

The parties did not discuss the relationship between two decisions of this court published within days of each other, *United States v. Redondo-Lemos*, 955 F.2d 1296 (9th Cir.1992), which was finalized on May 11, 1992, and *United States v. Bourgeois*, 964 F.2d 935 (9th Cir.1992), decided on May 19, 1992. *Bourgeois* and *Redondo-Lemos*, both thoughtful opinions, examined somewhat differently the process by which defendants can obtain discovery on a claim for selective prosecution.

In *Redondo-Lemos*, the defendant was caught transporting 695 pounds of marijuana into the United States from Mexico. The defendant pled guilty to a violation of 21 U.S.C. § 841(a)(1) in exchange for the government's promise to recommend that the district court impose only the mandatory minimum sentence of five years imprisonment. The district court, without any motion by the defendant, held that the United States Attorney's Office was selectively enforcing the drug laws against male defendants, and sentenced Redondo-Lemos to 18 months imprisonment instead of the 5-year mandatory minimum sentence.

On appeal, this court set forth the process for resolving a selective prosecution claim. First, *Redondo-Lemos* states that "[n]o one is entitled to call the prosecution to answer for a particular charging or plea bargaining decision without making a prima facie showing that wrongful discrimination is taking place." *Redondo-Lemos*, 955 F.2d at 1302. *Redondo-Lemos* states that a prima facie showing can be satisfied in one of two ways: (1) if "the district court develops a suspicion of unconstitutional conduct on the basis of its own day-to-day observations," or (2) if the defendant, rather than the

district court, is the one to raise the claim of selective prosecution, "he must present enough evidence to demonstrate a reasonable inference of invidious discrimination." *Id.* Only the suspicion of the district court, however, was at issue or applied in *Redondo-Lemos*.

Second, *Redondo-Lemos* states that once the prima facie case is established, the Office of the United States Attorney must have an opportunity to rebut the prima facie case. At this stage, the showing that the United States Attorney must make "would not involve file information about specific cases, but [rather would] consist only of overall case statistics." *Id.* Those overall statistics would be available to both the district court and defense attorneys. *Id.*

Third, if after the district court has seen the rebuttal evidence, the court finds discriminatory impact by a preponderance of the evidence, it then must determine if the prosecutor's charging decision was based on a discriminatory motive. *Id.* That decision "may, in rare instances, extend to in camera examination of certain prosecution case files and to limited discovery by opposing counsel." *Id.* In this third stage *Redondo-Lemos* for the first time raises the possibility of discovery by the defense. If, once the district court examines discriminatory motive and listens to government rebuttal evidence, the court finds by preponderance of the evidence intentional discrimination based on a suspect classification, it may fashion an appropriate remedy. *Id.*

Unlike *Redondo-Lemos*, *Bourgeois* confines itself to the question of when a defendant may obtain discovery based on a claim of selective prosecution. At issue in *Bourgeois* was a 2-day series of firearms arrests known as "Operation Streetsweep." *Bourgeois*, 964 F.2d at 936. *Bourgeois*, a felon, was

caught in Operation Streetsweep and indicted for possession of a firearm in violation of 18 U.S.C. § 922(g)(1). *Id.* at 937. Bourgeois moved to dismiss the indictment based on selective prosecution, arguing that he was selected for prosecution because he is black. *Id.* Bourgeois also filed a discovery request for information regarding the sting operation in which he was arrested. *Id.* The district court denied the discovery request, and Bourgeois entered a conditional guilty plea. *Id.*

On appeal, this court examined the question of when defendants are entitled to discovery on selective prosecution claims. Bourgeois noted that to be ultimately successful on a selective prosecution claim, a defendant would have to prove "that others similarly situated have not been prosecuted and also that the prosecution is based on an impermissible motive." *United States v. Wayte*, 710 F.2d 1385, 1387 (9th Cir.1983), quoted in *Bourgeois*, 964 F.2d at 938. Bourgeois then explained that it was an open question as to whether the standard for obtaining discovery was different from the standard for ultimate success on a selective prosecution claim, and to what degree. *Bourgeois*, 964 F.2d at 938.

The *Bourgeois* court decided that defendants must satisfy a high threshold to obtain discovery. *Id.* at 939. The court adopted a high threshold first because "courts are ill equipped to assess a prosecutor's charging decisions," and second because "court oversight of prosecutorial decisions could undermine effective law enforcement." *Id.* The court sought to "discourage fishing expeditions, protect legitimate prosecutorial discretion, safeguard government investigative records, and yet still allow meritorious claims to proceed." *Id.* at 940. The standard the court adopted to accomplish these ends was that "to obtain

discovery on a selective prosecution claim, a defendant must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of the government." *Id.* at 939. Bourgeois noted that the "colorable basis" standard was meant to continue the trend of the past few decades, during which time only a handful of defendants obtained discovery on a selective prosecution claim. *Id.* at 940.

Thus, the question for us here is whether to apply the *Redondo-Lemos* "suspicion" test, the *Redondo-Lemos* "reasonable inference" test, or the *Bourgeois* "colorable basis" test. In our view, the record does not support the proposition that the district court based its discovery order on its day-to-day observations, and therefore the *Redondo-Lemos* "suspicion" test is inapplicable. That conclusion is grounded in the district court's reasoning for granting the defendants' request for discovery.

The district court, in explaining its decision to order discovery, stated: "The court sees it different than *Bourgeois*, in that in this case we do have something more than mere allegations." The court thus relied on the reasoning of *Bourgeois* in analyzing the defendants' evidence, not on its own day-to-day observations. Additionally, the district court noted that at issue is "a fairly general charge—one that we see regularly in this courthouse—and whether it is coincidental or not, that out of the group that the public defender [proffered] all of them happen to be of the same racial group." (Emphasis added.) This further illustrates the district court's reliance on the evidence, not its own suspicions. The fact that the district court specifically expressed no opinion as to whether the racial composition of

defendants represented by the Federal Public Defender was a coincidence indicates not suspicion, but rather a lack thereof.

The district court concluded that "the number [of black defendants shown by the public defender] is adequate that [it] would at least require the government to provide some explanation. The time period is such that would require some explanation. The charges are the same or similar, and the race is the same in each case." Those comments immediately precede the district court granting the motion for discovery, and are the basis for doing so. The record demonstrates that the district court based its decision on the evidence presented by the defendants, not on its own day-to-day observations. As a result, the *Redondo-Lemos* "suspicion" test is inapplicable, and we must choose between the *Redondo-Lemos* "reasonable inference" test and the *Bourgeois* "colorable basis" test.

Although neither phrase is easily susceptible to further definition, we believe that it would be more appropriate to apply the *Bourgeois* "colorable basis" test in this particular case than the *Redondo-Lemos* "reasonable inference" test. As previously noted, *Redondo-Lemos* did not apply the "reasonable inference" test, as the district court initiated the selective prosecution inquiry *sua sponte*. Additionally, in *Redondo-Lemos* the defendant was not seeking discovery. *Redondo-Lemos*, 955 F.2d at 1297. The court simply was attempting to explain the entire process for pursuing a selective prosecution claim, of which discovery is one part. *See id.* at 1297, 1302. We doubt that the court in *Redondo-Lemos* intended its discussion to be the final expression of law in discovery cases.

Bourgeois, on the other hand, addressed a situation similar to the one here. *Bourgeois* alleged that he was selected for prosecution based on his race, and filed a discovery request in an attempt to prove his claim. *Bourgeois*, 964 F.2d at 937. The court squarely confronted the issue of when a defendant is entitled to discovery, and devoted approximately three pages of analysis to that issue alone. *See id.* at 937-40. The court in *Bourgeois* analyzed a split in the circuits and supported its decision to apply the "colorable basis" test with policy analysis. *Id.* When a district court bases its decision on evidence supplied by the parties rather than on its own day-to-day observations, *Bourgeois* is the law of this circuit regarding the test for determining whether to grant a defendant's motion for discovery on a selective prosecution claim.³

Having decided that the *Bourgeois* colorable basis test governs here, we must now apply that test to the facts of this case. The defendants submitted three affidavits and a newspaper article in support of their motion for discovery. The first affidavit, the statement and chart by the paralegal that was the only evidence the defendants initially offered, was that of 24 cocaine base cases closed by the Office of the Federal Public Defender in 1991, all 24 involved black defendants.

Taken alone, that evidence does not establish "specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on

³ For the reasons discussed *infra*, we believe that the evidence proffered by the defendants would fail to meet any reasonable formulation of the test for obtaining discovery as enunciated in either case.

the part of the government.” *Bourgeois*, 964 F.2d at 939. To demonstrate discriminatory application, a defendant must provide a colorable basis for believing that “others similarly situated have not been prosecuted.” *Wayte*, 710 F.2d at 1387, *quoted in Bourgeois*, 964 F.2d at 941. The first affidavit demonstrates only that others *have* been prosecuted, not that others similarly situated have not—obviously, a total lack of evidence cannot constitute a colorable basis for believing that discriminatory application of the law exists.

Requiring defendants to provide a colorable basis for believing that others similarly situated have not been prosecuted is a reasonable requirement. “Selective prosecution” implies that a selection has taken place. If a defendant is part of a protected class, that alone does not provide a colorable basis for believing that a selection has taken place; nor does evidence demonstrating that other members of the protected class were prosecuted provide a colorable basis for so believing. Rather, a defendant must supply a colorable basis for believing that others similar to him except that they are not in his protected class were not prosecuted. Without a colorable basis to believe that others similarly situated were not prosecuted, the most reasonable conclusion is that the defendant was selected for prosecution because the government believed the defendant committed the offense; the fact that the defendant is a member of a protected class is coincidental.

The evidence that all 24 cocaine base cases closed in 1991 by the Federal Public Defender involved black defendants is insufficient to provide a colorable basis to believe selection took place. The statistic in question does not speak to whether the Federal

Public Defender had other cases involving white defendants that did not close during that period. Additionally, there is no information on whether any of the defendants in the 24 cases were similarly situated to the defendants in this case. The government claims it selected the defendants for prosecution in this case because they committed cocaine base offenses while possessing firearms. If none of the 24 cases handled by the public defender involved firearms, the statistic is of little meaning, particularly in light of the government’s explanation. As a final criticism, the statistic tells us nothing of the racial composition of defendants charged with drug trafficking who may have had sufficient resources to retain their own attorneys.

The defendants contend, however, that the statistic is meaningful in light of the newspaper article and two affidavits supplied in opposition to the government’s motion for reconsideration. The article, from the *Los Angeles Times*, states that white cocaine offenders are being punished less severely because whites predominantly violate powder cocaine laws, while blacks predominantly violate crack cocaine laws, the latter of which carry longer sentences than the former. See Jim Newton, *Harsher Crack Sentences Criticized as Racial Inequality*, *Los Angeles Times*, Nov. 23, 1992, at A1, A20. We agree with the district court’s determination that nothing in the article supports the defendants’ position; indeed, the article arguable cuts the other way. Perhaps the defendants were alluding to an argument that the federal sentencing scheme violates equal protection because of this disparity, but because they did not actually make the argument, we express no opinion on that matter here. Any fault in this regard, if fault indeed exists, does not lie with the United

States Attorney, for the United States Attorney plays no role in drafting the United States Sentencing Guidelines.

The two additional affidavits, although not harmful to the defendants' position like the newspaper article arguably is, are not helpful either. One of the affidavits, made by an attorney for one of the defendants, states merely that an intake coordinator at a Pasadena halfway house had told the defense attorney that "it was his experience in dealing with the treatment of cocaine base addiction, that there are an equal number of Caucasian users and dealers to minority users and dealers." This statement is: (1) hearsay—the defendants certainly could have gotten an affidavit from the intake coordinator himself; (2) unsubstantiated; (3) without any indication of sample size, duration, or methodology of any kind; (4) without an indication of whether the magnitude of the sales is similar to those of the defendants in this case; (5) based on "users and dealers" rather than dealers who possess firearms; and (6) based on users and dealers being treated for addiction, without any evidence that such a sample is representative of dealers as a whole. The district court erred in placing any weight on such flimsy evidence.

The other affidavit, made by another attorney for the defense, states that "I talk to many state court judges, prosecutors, and defense attorneys . . . [and] [t]here are many crack cocaine sales cases prosecuted in state court that do involve racial groups other than blacks. A major percentage of sales of crack cocaine cases are prosecuted against Latinos in the state courts." This statement: (1) is hearsay—there are no affidavits from any of the unnamed purported sources of this information;

(2) fails to indicate whether the magnitude of the sales is similar to those of the defendants in this case; (3) does not include any information about cocaine base offenses involving the possession of firearms; and (4) gives no statistics, but rather merely reports the defense attorney's personal conclusions that there are "many" cases and that there is a "major" percentage. These are hardly the "specific facts, not mere allegations, which establish a colorable basis for the existence of . . . discriminatory application of a law" envisioned by *Bourgeois*. *Bourgeois*, 964 F.2d at 939.

Given that the ineffective affidavits and arguably damaging article, even taken together, did not contradict the government's explanation for its decision to prosecute, we must conclude that the district court abused its discretion in concluding that the defendants' evidence provided a colorable basis to believe that discriminatory application of a law existed. *Bourgeois*, as previously explained, set a high threshold for obtaining discovery, and expressed very sound policy rationales for doing so. *See id.* at 939-40. Had the district court viewed the defendants' evidence in light of the reasoning of *Bourgeois*, it should have concluded that the evidence failed to establish a colorable basis for believing that the government was engaging in selective prosecution.

As a final matter, one could argue that *Bourgeois* should be distinguished based on the duration of the government operations involved in each case. In *Bourgeois*, a 2-day operation was at issue, *id.* at 936, and in the instant case the defendants proffered a 2-month "study" by the Office of the Federal Public Defender. That distinction, by the very language of *Bourgeois*, is unimportant in this case.

The court in *Bourgeois* found that Bourgeois had failed to establish a colorable basis that others similarly situated had not been prosecuted. *Id.* at 941. It did this because "Bourgeois [made] no attempt to show that, *in any span of time*, the government has declined to prosecute similarly situated, non-black felons illegally in possession of firearms." *Id.* (emphasis added). Thus, the court explained that regardless of the duration of the operation in question, defendants attempting to obtain discovery on a claim of selective enforcement must provide a colorable basis for believing that similarly situated felons not in their protected class were passed over for prosecution. The evidence in this case was unsatisfactory for the very same reason, and the duration of the operations in each case therefore is irrelevant.

III. CONCLUSION

The district court erred in finding that the evidence the defendants presented in this case established a colorable basis for believing that the government engaged in selective prosecution. The defendants' evidence, which likely would be inadmissible in other contexts, was tenuous at best, and in one case even arguably was counterproductive. If more than this quantum of evidence is not required, district courts too often and unnecessarily could become immersed in the workings of a coordinate branch of government, to the benefit of neither. Accepting the defendants' weak evidence and disregarding the sworn declarations of experienced federal agents and two Assistant United States Attorneys that explained and refuted the defendants' statistics was error, and for that reason the decision of the district court dismissing the indictments is

REVERSED.

REINHARDT, Circuit Judge, dissenting:

Rozelle and Armstrong, two black criminal defendants, present one of the most serious claims any person can raise—that the government has engaged in racial discrimination in selecting which offenders to prosecute. Such a claim deserves the most careful examination, for the ability to decide whether to bring charges gives prosecutors an awesome power to affect people's lives. When prosecutors use this power in a racially discriminatory manner, courts must step in to protect the objects of that conduct. Moreover, when one of our experienced district judges finds credible evidence that federal prosecutors are engaging in such impermissible discrimination, we should be most hesitant to prevent her from gathering further information that will permit a full examination of the claim. Yet the majority here abruptly cuts off exploration of the explosive charge made by these two defendants, concluding, surprisingly, that Judge Marshall abused her discretion in ordering further discovery. I disagree strongly with my colleagues' decision. The defendants have shown far more than a "colorable basis" for a belief that the practice of racially discriminatory prosecution exists. Moreover, the district judge's own observations and experience with the United States Attorney's office provide substantial additional support for the discovery order. For these reasons, and because recent studies indicate that further discovery might conclusively prove that prosecutors have engaged in unconstitutional conduct, I dissent.

I.

At the outset, it is important to make plain the narrow scope of our review, a scope which the majority clearly exceeds. First, we are reviewing only the district court's *discovery* order. The district court has not decided that the defendants have shown unconstitutional selective prosecution, and the defendants do not have to *prove* impermissible discrimination to obtain discovery. If they could make such a showing without any discovery, there would be no need for discovery in the first place. Because we review only the district court's decision to allow the defendants to gather more evidence, it is not our job to decide whether the defendants have made an ultimate showing of unconstitutional discrimination. Their burden in cases of this nature is far less.

Second, we review the district court's decision to order discovery for *abuse of discretion*. *United States v. Bourgeois*, 964 F.2d 935, 937 (9th Cir.1992). "The task of safeguarding the rights of criminal defendants ultimately rests with the experienced men and women who preside in our district courts." *United States v. Balough*, 820 F.2d 1485, 1491 (9th Cir.1987). District judges are uniquely situated to observe possible discrimination in the government's charging decisions. They have much more experience with the policies and practices of the United States Attorney in their district than do we, and they are obviously in a better position to observe a pattern of discrimination than are individual defendants. See *United States v. Redondo-Lemos*, 955 F.2d 1296, 1298, 1302 (9th Cir.1992). Accordingly, when a district court, knowledgeable of the practices and performance of a particular United States Attorney's

office, finds a defendant's showing of selective prosecution sufficiently persuasive to warrant further inquiry, we should only overturn its decision based on a very clear showing of error. Were my colleagues to afford the district court's determination the deference to which it is entitled, they would have no choice but to affirm.

II.

A.

The effect of the majority's decision is to create three highly artificial categories of cases. At one extreme are the cases in which a district judge completely ignores his or her own experience and observations and makes clear on the record that the discovery order is based *solely* on the submissions of the parties. Under the majority's opinion, this category of cases is governed by the *Bourgeois* standard, and the evidence submitted by the parties must create a "colorable basis" for the discovery order.¹ At the other extreme are those cases in

¹ Unlike the majority, I see no practical difference between *Bourgeois*'s "colorable basis" test and the "reasonable inference" test which *Redondo-Lemos* requires be used when a party offers evidence tending to establish selective prosecution. There is nothing in these phrases or in the courts' analysis in *Bourgeois* and *Redondo-Lemos* to suggest any difference between these standards. (Nor, incidentally, does the majority explain how they differ).

I note that the majority's recitation of the framework set forth in *Redondo-Lemos* is somewhat misleading. The majority states that *Redondo-Lemos* does not "raise[] the possibility of discovery by the defense" until after the defendant has presented evidence creating a "reasonable inference" of discrimination and the prosecution has had an opportunity to rebut this showing. [P. 75a, *supra*]. The majority ignores footnote 12 of *Redondo-Lemos*, which clearly contemplates

which, as in *Redondo-Lemos*, a district judge develops a suspicion of discriminatory conduct based purely on his own day-to-day observations and orders discovery or a hearing without any prompting by the parties. In this category of cases, the "suspicion" rule set forth in *Redondo-Lemos* requires a reviewing court to defer to the district judge's determinations.

In between these extremes lie the cases which surely arise most frequently—those in which a district judge's decision to order discovery is based in part on the evidence submitted by the parties and in part on his own personal experience, observations, and suspicions. Although in its opinion the majority, remarkably, does not acknowledge the existence of this category and thus does not discuss the standard to be applied in mixed-basis cases, it is clear that, whether these cases are viewed through the framework provided by *Redondo-Lemos* or that provided by *Bourgeois*, an appellate court should overturn a district court's order permitting discovery in such cases in only the rarest of circumstances. When the evidence presented by a defendant, combined with a district judge's own observations, convinces the judge that further inquiry is warranted, it should ordinarily be enough to satisfy *any* of the standards we have enunciated.

B.

The majority's decision to reverse the district judge is based on its conclusion that this case falls into the first of the three categories—that the record makes clear that Judge Marshall deliberately put

"limited discovery in appropriate circumstances prior to the prosecutor's evidentiary presentation." *Redondo-Lemos*, 955 F.2d at 1302 n. 12.

aside her day-to-day observations and experience with the United States Attorney's office and based her decision solely on the parties' submissions. My colleagues conclude that in this case the district judge relied in *no* part on her own observations: "The record demonstrates that the district court based its decision on the evidence presented by the defendants, not on its own day to day observations." *Ante* at 1435-36. My colleagues appear to concede that when "the district court develops a suspicion of unconstitutional conduct on the basis of its own day-to-day observations, this will be deemed a sufficient *prima facie* showing" to support a further inquiry by the district court, including limited discovery. *Redondo-Lemos*, 955 F.2d at 1302. However, instead of treating this as a mixed-basis case, in which a district court's review of the evidence, augmented by its experience with the particular prosecutor's office, is entitled to substantial deference, the majority looks only at the evidence presented by the defendants. My colleagues then hold that the defendants' submissions fail to meet the *Bourgeois* standards for discovery.

C.

I have three objections to the majority's decision. First, as I have suggested, I believe that its creation of three arbitrary categories unnecessarily and improperly complicates this area of the law. Discovery orders in discriminatory prosecution cases should be judged by a single standard, one that draws on the principles enunciated in both *Redondo-Lemos* and *Bourgeois*. This standard should be appropriate for use in the vast majority of cases—those in which the district judge makes a decision to order discovery based in part on the evidence submitted by the parties and in part on his own observations and experience.

It should apply uniformly, regardless of whether the district court relies only slightly on the evidence presented by the parties and most substantially on his own experience, or vice versa, or even if the district court disclaims any knowledge of the general subject. In any event, the standard should require reversal of an order permitting discovery only when, giving substantial weight to the district court's own observations, the court could not rationally have reached the judgment it did.

Even assuming the majority's three-tiered approach is coherent or sensible, I disagree strongly with its decision to place this case in the first category—to classify it as a case in which the district court ignored its own experience and relied solely on the evidence presented by the parties. A fair view of the record demonstrates to me that Judge Marshall's decision to order discovery was based at least in part on her own observations of and experience with the United States Attorney's office.² If my colleagues were to consider that factor in combination with the evidentiary showing they reject, they would surely be required to uphold the district court's order. Thus, on remand Judge Marshall will be free to issue a new discovery order if she bases that new order in part upon her own day-to-day experience.

² For example, in ordering discovery, the district judge stated:

That is the problem I think that needs to be addressed, because we do see a lot of the cases and one does ask why some are in state court and some are being prosecuted in Federal court, and if it's not based on race what's it based on?

Finally, I believe that the defendants have made a sufficient evidentiary showing, wholly apart from the district judge's observations, to support the discovery order previously issued. Thus, even if I agreed with the majority that the district court entirely ignored its day-to-day observations and focused solely on the parties' evidentiary submissions, I would still affirm under the *Bourgeois* standard. I explain why below.

III.

The *Bourgeois* standard is not as difficult to meet as the majority's conclusion in this case might lead one to believe. Because we thought that a "non-frivolousness" standard would allow a defendant too easily to delay a prosecution and initiate intrusive discovery, and that a "prima facie case" standard would often make it impossible for defendants with legitimate claims to obtain the evidence necessary to support them, we sought a middle ground in *Bourgeois*. See *Bourgeois*, 964 F.2d at 938-39. We settled on a "colorable basis" standard:

[T]o obtain discovery on a selective prosecution claim, a defendant must present specific facts, not mere allegations, which establish a colorable basis of both discriminatory application of a law and discriminatory intent on the part of government actors.

Id. at 939.

Although we described the *Bourgeois* standard as establishing a "high threshold," *id.*, it is clear that under that test a defendant need not come anywhere close to proving a claim of selective prosecution in order to obtain discovery. Indeed, the defendant need not even present a prima facie case. The defendant instead need only present "some evidence tending to show the essential elements of the claim." *United*

States v. Heidecke, 900 F.2d 1155, 1159 (7th Cir.1990) (discussing "colorable basis" standard). While a defendant will not satisfy his burden by merely presenting unsubstantiated or generalized allegations, he is entitled to discovery if he can show some specific facts which raise an inference of impermissible discrimination.³

Under the *Bourgeois* standard, the defendants have presented more than enough evidence to raise a sufficient inference of discrimination to warrant discovery. In particular, the study conducted by the Office of the Federal Public Defender raises a strong inference of invidious discrimination. This study found that, of all cocaine base cases closed by the Office in 1991, 24 out of 24 involved black defendants. To be sure, such a small sample does not conclusively establish either of the elements of selective prosecution. However, the fact that *every single* crack defendant represented by the Federal Public Defender in a case that terminated during 1991 was black certainly raises enough of a question to justify further inquiry by the court.

The evidence supporting an inference of discriminatory prosecution in this case is much stronger than the evidence we held insufficient to justify discovery in *Bourgeois*. In that case, the defendants argued that they were entitled to discovery based on a showing that all prosecutions for firearms violations stemming from a *two-day* police operation involved black defendants. The district

³ Thus, the *Bourgeois* court's prediction that only a small number of defendants would be able to make a sufficient showing to obtain discovery was just that—a prediction. It provides no basis for artificially raising the standard which defendants must meet in order to gather more information on their discriminatory prosecution claims.

court rejected the defendants' claims, holding that two days was far too short a period to serve as a basis for analyzing the overall conduct of a prosecutorial agency. Instead of focusing on the single operation which resulted in the arrests of Bourgeois and his associates, the district court looked instead to all firearms prosecutions over a *two-year* span. The court found that the government had prosecuted over 140 people during that period for the same crimes as those for which Bourgeois was prosecuted. Because Bourgeois "did not allege that all or most of these cases involved blacks," *Bourgeois*, 964 F.2d at 940, the district court concluded that he had not established a colorable basis to justify discovery. We held that the district court did not abuse its discretion in refusing to order discovery in these circumstances. *See id.* at 941.⁴

⁴ By lifting a sentence out of context and then misreading it, the majority unintentionally distorts our decision in *Bourgeois*. The majority states:

The court in *Bourgeois* found that Bourgeois had failed to establish a colorable basis that others similarly situated had not been prosecuted. It did this because "Bourgeois [made] no attempt to show that, *in any span of time*, the government has declined to prosecute similarly situated, non-black felons illegally in possession of firearms." Thus, the court explained that regardless of the duration of the operation in question, defendants attempting to obtain discovery on a claim of selective enforcement must provide a colorable basis for believing that similarly situated felons not in their protected class were passed over for prosecution. The evidence in this case was unsatisfactory for the very same reason, and the duration of the operation in each case therefore irrelevant.

[P. 84a, *supra*] (citations omitted) (emphasis in majority opinion).

The evidence offered in *Bourgeois* involved only one operation, over a single two-day period. The Federal Public Defender study, by contrast, involved an agency that represents a significant percentage of all federal criminal defendants, and it involved all cases closed over a significant period of time. Common sense indicates that the inference of discrimination one can reasonably draw from such a study is much stronger than the inference one can draw from evidence involving only a single, short police operation. See *id.* at 941 (“[T]he relevant inquiry is the history of prosecutions over a reasonable period of time.”). The study showed that the largest single provider of legal services to federal criminal defendants in the Central District of California did not conclude a single crack defense of a non-black defendant in *all of 1991*. Although the sample size is too small to resolve the issue either way, this evidence certainly raises a serious question whether

Contrary to the majority’s understanding, the issue in *Bourgeois* was *precisely* whether the defendants had shown discrimination *over a sufficient period of time*. The *Bourgeois* court assumed that, during the two-day period in question, the government had prosecuted only blacks and had failed to prosecute similarly situated non-blacks. However, it held that a two-day focus was too narrow: “The government need not provide discovery on a selective prosecution claim simply because law enforcement officials focused for a short time on a racially homogeneous criminal group.” *Bourgeois*, 964 F.2d at 940-41. The sentence immediately preceding the one the majority selectively quotes states that “[a]s discussed above, the relevant inquiry is the history of prosecutions over a reasonable period of time.” *Id.* at 941. In this context, the *Bourgeois* court’s statement that “*Bourgeois* makes no attempt to show that, in any span of time, the government has failed to prosecute similarly situated, non-black felons illegally in possession of firearms” simply refers to the defendants’ failure to make a showing of discrimination across a “span of time.”

the government is intentionally discriminating against blacks. I do not see how the majority can conclude that it was an *abuse of discretion* for the district court to allow the defendants to inquire further into the issue.

The majority concludes that the Federal Public Defender study is insufficient to warrant discovery because it “demonstrates only that others *have* been prosecuted, not that others similarly situated have not.” [P. 80a, *supra*]. Yet even by the majority’s own standard a defendant is not required to *demonstrate* that the government has failed to prosecute others who are similarly situated. He need only “*provide a colorable basis* for believing that others similarly situated have not been prosecuted.” [P. 80a, *supra*]. (emphasis added). The study introduced by the defendants clearly satisfies this requirement. Given the prevalence of all kinds of drugs throughout our community, at least *some* crack distributors must be non-blacks. The fact that the Office of the Federal Public Defender had not closed a case involving a *single* non-black defendant in an entire year provides at least a colorable basis to believe that some non-black offenders existed whom the United States Attorney failed to prosecute.

When a defendant presents statistics *tending* to show that *all* prosecutions over a significant period of time are directed at members of a single race, such a presentation alone should raise sufficient suspicion to warrant a further inquiry. On closer scrutiny, we may discover that the statistics can be explained by methodological defects, such as an inadequate sample size or an insufficient time-frame. However, one fact we most assuredly will *never* find. If our method of analysis is at all fair or rational, we will *not* discover

that it is *only* members of the defendant's race who commit the crime in question.

Contrary to the majority's view, we must assume, what is unquestionably the case, that people of *all* races commit *all* types of crimes. Under no circumstances can we base our analysis on the premise that any type of crime may be the exclusive province of any particular racial or ethnic group. Yet that is precisely what the majority does. Even if the defendants made a conclusive showing that the government had only prosecuted members of a single race for a particular class of crime, the majority would apparently conclude that they had failed to meet their burden. My colleagues would apparently require the defendants to present *affirmative evidence* showing that similarly situated potential defendants of other races existed—in other words that whites and browns also commit violations of 21 U.S.C. §§ 841 and 846. *See ante* at 1436 ("The first affidavit demonstrates only that others *have* been prosecuted, not that others similarly situated have not—obviously, a total lack of evidence cannot constitute a colorable basis for believing that discriminatory application of the law exists."). Unless we make the unsupportable assumption that there is a reasonable possibility that *only* blacks commit the crimes with which the defendants are charged, the majority's analysis is manifestly erroneous. If the United States Attorney's office prosecutes only members of a particular race, simple logic and common sense tell us that it is failing to prosecute at least some similarly-situated members of other races. Where a defendant shows a reasonable statistical basis for the inference that all defendants charged with a particular federal crime over a significant period of time were members of a single

race, such a showing creates, ipso facto, a colorable basis for believing that similarly situated members of other races were not prosecuted. Therefore, there is no legal basis whatsoever for requiring the defendant to point to particular cases in which the government failed to prosecute similarly-situated members of other races.

The majority rightly notes that the Federal Public Defender study does not in itself establish that the United States Attorney has engaged in selective prosecution. It is true that the study refers only to cases *closed* in 1991 and that it fails to provide more detailed information regarding the specifics of the offenses the other defendants allegedly committed. It is also true that the study does not disclose whether any non-black defendants existed who could afford to hire their own attorneys. *See* [p. 80a, *supra*]. While these aspects of the study render it insufficient to support an ultimate showing of unconstitutional selective prosecution, the facts set forth are nonetheless more than enough to support a finding of a colorable basis for the claim that discrimination exists. Despite the limitations in the study's methodology, it is sufficient to lead a reasonable person to believe that the United States Attorney might be engaging in discrimination and that further inquiry on the subject is warranted. That is precisely the course the district court took here, and I do not believe that it abused its discretion in doing so.

Although the Federal Public Defender study should have been enough to create a colorable basis, the defendants here did provide additional evidence that the federal government failed to prosecute similarly-situated non-black defendants. On the government's motion for reconsideration, the defendants introduced two affidavits from different defense

attorneys. One related a statement made by an intake coordinator at a Pasadena halfway house who said that, in his experience, there were an equal number of white and non-white users and dealers of crack. The other affidavit came from David R. Reed, an experienced criminal defense attorney in the Central District. Reed stated that, in his experience as a federal criminal defense lawyer and as a director of the state court indigent defense panel, he had never handled, known of, or heard of a single federal crack cocaine case involving non-black defendants, but that he knew of many crack cocaine cases prosecuted against non-blacks in state court.

My colleagues wholly discount these affidavits. Their analysis is flawed in two separate respects, however. First, they seem to believe that the affidavits must be considered in isolation, rather than in light of the Federal Public Defender Study. They criticize the district court for "placing any weight" on the first affidavit, [pp. 79a-80a, *supra*], and they state that the second affidavit failed to contain "the 'specific facts, not mere allegations, which establish a colorable basis for the existence of . . . discriminatory application of a law.'" [Pp. 79a-80a] (quoting *Bourgeois*, 964 F.2d at 939). Whether or not it would have been appropriate for the district court to place any weight on the declarations if they stood alone, they surely satisfy the defendants' burden when considered in light of the study's finding that *all* federal crack defendants were black. When all of this evidence is taken together, the defendants have established several "specific facts, not mere allegations, which establish a colorable basis" to believe that the government has engaged in selective prosecution: (1) in all crack cocaine cases closed by the Federal Public Defender's Office in 1991, not a

single case involved a non-black defendant; (2) an individual with professional experience in treating cocaine base addicts was of the opinion that minorities and non-minorities used and dealt crack in roughly equal numbers; (3) a criminal defense lawyer experienced in defending individuals in federal court, and overseeing indigent defense in state court, had knowledge of many non-black crack offenders who were prosecuted in state court, but none who were prosecuted in federal court.

Second, the majority appears to ignore the fact that the defendants are only seeking *discovery* on their selective prosecution claim. The defendant's burden in seeking discovery is obviously significantly less than the defendant's ultimate burden of proving that the government engaged in discriminatory prosecution. Under *Bourgeois*, a defendant need not even present a *prima facie* case in order to obtain discovery, only a colorable basis. See *Bourgeois*, 964 F.2d at 939. There is no reason to require the defendant to produce admissible evidence in making such a showing.⁵ In other contexts in which a party bears a lighter burden of proof than a preponderance of the evidence, the law has held that the lesser *quantum* of evidence required also entails looser requirements regarding the *admissibility* of that evidence. See, e.g., *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956) (grand jury); *United States v. One 56-Foot Motor Yacht Named*

⁵ I should emphasize that the Federal Public Defender study was clearly admissible, and, in my view, it was sufficient in itself to create a colorable basis. The majority only challenges the admissibility of the two declarations. In this connection, I should note that any objection as to admissibility must be raised in the district court and that no such objection was made here.

the Tahuna, 702 F.2d 1276, 1283 (9th Cir.1983) (probable cause for forfeiture); Fed.R.Crim.P. 5.1(a) (preliminary probable cause hearing). That rule is applicable here as well. The majority thus errs in dismissing the declarations as hearsay.

The majority also errs by appearing to require the defendants to substantiate their claims more fully at this stage of the proceedings than is necessary under *Bourgeois*. In order to obtain discovery, defendants should not be required to present sophisticated regression analyses closely following the dictates of the scientific method. Nor should they be required to compile facts which are not readily available to them, such as the racial breakdown and offense characteristics of defendants represented by other counsel. Instead, they should only be required to show that specific facts raise a strong inference of impermissible discrimination, and they should only be expected to use whatever evidence is within their possession or reasonably obtainable. The defendants here have satisfied that burden.⁶

⁶ I should note that nearly all of the data necessary to a showing of selective prosecution are far less accessible to the defendants than to the federal government. Federal and county law enforcement authorities cooperate closely in these cases, and both levels of government are involved in the decision whether to bring charges in federal or state court. The Assistant United States Attorney admitted as much before the district court. He stated that many cocaine base cases were investigated as part of a joint federal/state task force involving local police departments and the federal Bureau of Alcohol, Tobacco, and Firearms. Given that the federal and local authorities work so closely in investigating these crimes, the federal government probably already has records of the cases in which it declined to initiate a federal prosecution. In any event, it is surely much easier for the United States Attorney's office to get this information from state officials, from the

IV.

As I explained above, the majority's opinion leaves Judge Marshall free on remand to impose the same discovery order as she had before, so long as she explains that she is basing her order in part on her personal observations of and experience with the United States Attorney's office. In addition, even disregarding that factor, it appears that a sufficient factual basis now exists to satisfy even the majority's overly restrictive application of our standards. A study by Richard Berk of the Center for the Study of the Environment and Society of the University of California at Los Angeles demonstrates that the United States Attorney has failed to prosecute similarly situated white offenders. See Richard Berk and Alec Campbell, *Preliminary Data on Race and Crack Charging Practices in Los Angeles*, 6 Fed. Sentencing Rep. 36 (1993). Although this study was not before the district court, and thus is not part of the record we review, it provides further indication that the majority has erred in disregarding the evidence that is before it and in overturning the district court's order.⁷ If the defendants renew their

county prosecutor's offices, and from local police departments than it is for criminal defense lawyers. Federal, state, and local law enforcement authorities have a cooperative relationship; prosecutors and defense lawyers have an adversarial relationship. Especially since the pertinent records relating to cases in the geographical area covered by the Central District may well be scattered across seven different county district attorney's offices, seven separate sheriff's departments, and a large number of independent local police departments, the defendants would have an almost impossible time compiling data on their own.

⁷ We may take judicial notice of this published study on appeal. See *Brown v. Board of Education*, 347 U.S. 483, 494 n.

motion on remand and introduce this study as evidence, the district court would clearly be justified—even without considering its own experience—in reinstating the discovery order.

The Berk study analyzed both state and federal data concerning crack cocaine offenses in the Los Angeles area. Specifically, it analyzed all arrests for sale of cocaine base within Los Angeles County between January 1, 1990 and October 10, 1992, all cases referred to the Los Angeles County District Attorney for sale of cocaine base between January 1, 1990 and August 11, 1992, and all sale of cocaine base cases prosecuted by the United States Attorney for the Central District of California between 1988 and 1992. *See id.* at 36.

Analyzing these data, the Berk study reached some alarming conclusions, which are consistent with the defendants' position here.⁸ Like the Federal Public Defender study, the Berk study found that, over a nearly two-year period, the United States Attorney did not charge even a single white person with sale of crack cocaine. By analyzing state data, however, the Berk study also refuted the majority's implicit assumption that non-blacks simply do not commit these crimes. Indeed, the data showed that the Los Angeles County District Attorney charged over two hundred whites with sale of cocaine base during this period.

The Berk study's conclusions strongly suggest that the United States Attorney's office has engaged in discriminatory prosecution. Although only 58 per

11, 74 S.Ct. 686, 692 n. 11, 98 L.Ed. 873 (1954); *Swan v. Peterson*, 6 F.3d 1373 n. 9 (9th Cir.1993).

⁸ The statistical conclusions of the Berk study are summarized on page 37.

cent of the arrests in Los Angeles County for sale of crack during the study's time period involved blacks, and only 53 per cent of crack sale charges by the Los Angeles County District Attorney involved black defendants, the United States Attorney targeted black defendants a full 83 per cent of the time. The disparity between the state and federal figures would seem to necessitate a further investigation of the reasons for the differing actions by the two prosecutorial agencies. In conducting his study, Professor Berk performed chi-squared tests to determine whether the results of his statistical survey could be attributed to chance rather than discrimination. He found that "[f]or the federal data, the chances are less than 1 in 100 (p-value = .0088) that they are just a 'luck of the draw' sample for the population of people arrested." *Id.* at 38.

The Berk study, as well as the data proffered by the defendants in this case, is sufficient to raise a serious question about whether the United States Attorney's office is treating all of the people it serves equally. In particular, it raises the question of whether the United States Attorney reserves the ten-year federal mandatory minimum sentences for black defendants, while allowing non-black defendants to receive three, four, or five year sentences in state court. We cannot tolerate basing the length of a sentence on the color of a defendant's skin. Where there is a *colorable* showing that this may be occurring, an inquiry is required.

V.

As a practical matter, as I have pointed out, the majority's opinion will have little or no effect on the further proceedings in the district court. The Berk study, which was not before the court when it made

its discovery order here, will certainly provide enough of an additional "colorable basis" to support discovery if and when the defendants file a renewed or amended motion following remand. So, too, will the personal knowledge and experience that the majority finds Judge Marshall failed to avail herself of the first time.

Nonetheless, it is most unfortunate that the majority overrules Judge Marshall's considered attempt to gain more information about the United States Attorney's charging practices. The five to seven year difference between state and federal sentences for crack sale offenses is not merely academic—five years is a long time to spend in prison. As long as this disparity exists, federal courts have an obligation to make sure that the United States Attorney is treating all members of the community fairly and equally.

Judge Marshall's actions showed the judiciary at its best. Unlike the majority, I would not be so quick to overrule her attempt to explore this critical issue and to get more objective information before the court. Certainly, there is no basis whatsoever for concluding that Judge Marshall *abused her discretion* in trying to do so and in determining that the defendants made a *colorable* showing of discriminatory enforcement of the law.

Judge Marshall acted properly by ordering discovery with respect to this issue. I would affirm.

APPENDIX C

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CRIMINAL MINUTES — GENERAL**

Case No. CR92-336 CBMDate 12/29/92

DOCKET ENTRY: The Government's motion for reconsideration of Court's Ruling is denied (CMB)

Present: HON. CONSUELO B. MARSHALL, JUDGE

<u>Joseph M. Levario</u>	<u>n/a</u>	<u>n/a</u>
Deputy Clerk	Court Reporter	Asst. U.S. Attorney

U.S.A. v. (DEFENDANTS LISTED BELOW) ATTORNEYS FOR DEFENDANTS

(1) Christopher Armstrong, et al. (1) n/a
 _present _custody _bond _O/R _present _appointed _retained

(2)
 _present _custody _bond _O/R _present _appointed _retained

(3)
 _present _custody _bond _O/R _present _appointed _retained

(4)
 _present _custody _bond _O/R _present _appointed _retained

[Certificate of Service Omitted]

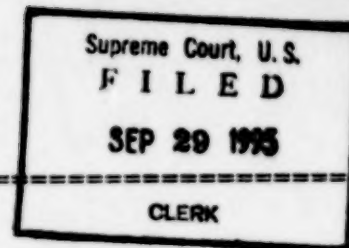
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No. 95-157



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRISTOPHER LEE ARMSTRONG, ET. AL.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

A. WHETHER THE COLORABLE BASIS STANDARD FOR INITIATION OF DISCOVERY ON A CLAIM OF DISCRIMINATORY PROSECUTION, AS EXPLAINED AND REFINED BY THE NINTH CIRCUIT COURT OF APPEALS, IS SUFFICIENTLY IN ACCORD WITH ESTABLISHED FEDERAL LAW.

B. WHETHER A DISTRICT COURT ABUSED ITS DISCRETION IN ISSUING A NARROW DISCOVERY ORDER AFTER BEING PRESENTED WITH EVIDENCE PROVIDING A COLORABLE BASIS TO BELIEVE SELECTIVE PROSECUTION MAY HAVE OCCURRED.

TABLE OF CONTENTS

	<u>Page</u>
OPINIONS BELOW.....	1
JURISDICTION.....	1
PARTIES TO THE PROCEEDING.....	2
STATEMENT.....	2
REASONS FOR DENYING THE PETITION.....	8
CONCLUSION.....	16
MOTION TO LEAVE TO PROCEED IN FORMA PAUPERIS.....	18
CERTIFICATE OF SERVICE.....	19

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Arlington Height v. Metropolitan Housing Development Corp.</u> 429 U.S. 252, 266 (1977).....	15
<u>Attorney General of United States v. Irish People, Inc.</u> 684 F. 2d 928, 948 (D.C. Cir. 1982).....	11
<u>Batson v. Kentucky</u> 476 U.S. 79 (1986).....	15
<u>In re Grand Jury</u> 619 F, 2d 1022,1030 (3d Cir. 1980).....	11
<u>Gomillion v. Lightfoot</u> 36405 339 (1960).....	15
<u>St. Germain of Alaska Easter Orthodox Catholic Church v. United States</u> 840 F. 2d 1087, 1095 (2d Cir. 1988).....	11
<u>United States v. Adams</u> 870 F. 2d 1140, 1146 (6TH Cir.1989).....	11
<u>United States v. Armstrong</u> 48 F. 3d 1508,1512 (9th Cir. 1995).....	11
<u>United States v. Balough</u> 820 F. 2d 1485, 1491 (9th Cir.1987).....	14
<u>United States v. Berrigan</u> 482 F. 2d 171, 181 (3rd Cir. 1973).....	14
<u>United States v. Berrios</u> 501 F. 2d 1207, 1212 (2nd Cir. 1974).....	14
<u>United States v. Bourgeois</u> 964 F 2d 935, 940 (9th Cir.1992).....	6,8
<u>United States v. Greenwood</u> 796 F. 2d 49, 52 (4th Cir. 1986).....	11,14
<u>United States v. Gomez-Lopez</u> Daily Journal D.A.R. 10560.....	12

TABLE OF AUTHORITIES-Continued

<u>Cases</u>	<u>Page</u>
<u>United States v. Gordon</u> 817 F. 2d 1538, 1540 (11th Cir. 1988).....	11
<u>United States v. Heidecke</u> 900 F. 2d 1155, 1159 (7th Cir. 1990).....	11, 14
<u>United States v. Henry</u> CR 94628-CBM (C.D. Cal June 26, 1995).....	12
<u>United States v. Hintzman</u> 806 F. 2d 840, 846 (8th Cir. 1986).....	14
<u>United States v. Johnson</u> 577 F. 2d 1304, 1308 (5th Cir. 1978).....	11
<u>United States v. Parham</u> 16 F. 3d 844, 847 (8th Cir. 1994).....	11
<u>United States v. P.H.E., Inc.</u> 965 F. 2d 848, 860 (10th Cir. 1992).....	11
<u>United States v. Penagarican-Soler</u> 911 F. 2d 833, 838 (1st Cir. 1990).....	11
<u>United States v. Redondo-Lemos</u> 995 F 2d 1302 (9th Cir. 1992).....	8
<u>United States v. Wayte</u> 470 U.S. 598, (1985).....	10
<u>Washington v. Davis</u> 426 U.S. 229 242 (1976).....	15
<u>Yick Wo v. Hopkins</u> 118 US 356, 30 (1886).....	15

TABLE OF AUTHORITIES-Continued

	<u>Page</u>
<u>Statutes</u>	
18 U.S.C. § 924 (c).....	2
21 U.S.C. § 841 (a) (1).....	2, 3
21 U.S.C. § 841 (b).....	2
21 U.S.C. § 846.....	2, 3
28 U.S.C. § 1254 (1).....	2
Cal. Health & Safety Code § 11351.5.....	3
<u>Miscellaneous</u>	
U.S. Sentencing Commissions: Materials Concerning Sentencing for Crack Cocaine Offenses, 57 Criminal Law Reporter 2127, 2131 (May 31, 1995).....	14

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

No. 95-157

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRISTOPHER LEE ARMSTRONG, ET. AL.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT AARON HAMPTON

OPINIONS BELOW

The opinion of the en banc court of appeals is reported at 48 F.3d 1508. The panel opinion of the court of appeals is reported at 21 F. 3d 1431.

JURISDICTION

The judgement of the en banc court of appeals was entered on March 2, 1995. By order dated June 21, 1995, Justice

O' Connor extended the time within which to file a petition for a writ of certiorari to and including July 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

PARTIES TO THE PROCEEDING

The petitioner is the United States of America. The respondents are Christopher Lee Armstrong, Robert Rozelle, Aaron Hampton, Freddie Mack, and Shelton Auntwan Martin.

STATEMENT

In April of 1992, respondent Aaron Hampton, Christopher Armstrong, Freddie Mack, Shelton Martin, and Robert Rozelle were charged with federal offenses for their alleged involvement in the distribution of cocaine base ("crack"). The charges stemmed from an investigation conducted under the direction of a joint state and federal task force comprised of detectives from the Inglewood Narcotics Division and agents from the Bureau of Alcohol, Tobacco, and Firearms.

Respondents, each of whom is a young African-American male, were charged with conspiracy to distribute cocaine base under 21 U.S.C. § 846. Some of the defendants were also charged with selling cocaine base under 21 U.S.C. 841 (a)(1) and using firearms in connection with drug trafficking in violation of 18 U.S.C. § 924 (c). The decision to charge the defendants with federal rather than California State offenses was significant. Federal law imposes a minimum sentence of 10 years and a maximum of life for those convicted of selling more than 50 grams of

cocaine base. 21 U.S.C. § 841 (b). By contrast, under California law, the minimum sentence for that offense is three years and the maximum is five. Cal. Health & Safety Code § 11351.5 (Deering 1993).

Respondents filed a Motion for Discovery and/or Dismissal of Indictment for Selective Prosecution, claiming that the decision to prosecute on federal instead of state charges was based on race. To support the motion for discovery, the defendants offered into evidence a study of every case involving a charge under 21 U.S.C. §§ 841 and 846 that the Federal Public Defender's Office for the Central District of California had closed in 1991. The study showed that in all 24 such cases the defendants had been black.

The district court granted the motion for discovery. Specifically, the district judge ordered the government to: (1) provide a list of all cases from the prior three years in which the government charged both cocaine base offenses and firearms offenses; (2) identify the race of the defendants in those cases; (3) identify whether state, federal, or joint law enforcement authorities investigated each case; and (4) explain the criteria used by the U.S. Attorney's Office for deciding whether to bring cocaine base cases to the federal court.

The government chose not to comply with the discovery order and instead filed a motion for reconsideration. In support of its motion, the government provided a list of all defendants charged with violations of 21 U.S.C. §§ 841 and 846 over a three year period (without any racial breakdown) as well as

declarations by three law enforcement officers and two Assistant United States Attorneys. The declarations collectively asserted that socioeconomic factors led certain ethnic and racial groups to be particularly involved with the distribution of certain drugs and that Blacks were particularly involved in the Los Angeles-area crack trade. The declarations also contained a description of some of the race neutral factors on which federal prosecutors based their charging decisions for crack-related offenses. The factors included were the strength of the evidence, the deterrent value of bringing the charge, the federal interest in the prosecution, and the suspect's criminal history.

In response, the defendants bolstered the statistical study they had submitted at the initial hearing with additional declarations. First, one of the defendant's counsel offered an affidavit stating that she had spoken with a halfway house intake coordinator who told her that in his experience treating cocaine base addicts, whites and blacks dealt and used the drug in equal numbers. Second, another defense attorney asserted in a declaration that his experience and conversations with judges, lawyers, and defendants led him to conclude that many non-blacks were prosecuted for cocaine base offenses in state court. Finally, the defendants submitted an article from the Los Angeles Times discussing the disparate federal sentences imposed for cocaine base and regular cocaine offenses.

The District Court denied the motion for reconsideration. The court stated its reasons for the denial at the hearing: "The statistical data provided by the Defendant

raises a question about the motivation of the Government which could be satisfied by the government disclosing its criteria, if there is any criteria, for bringing this case and others like it in Federal Court. Without this criteria the statistical data is evidence and does suggest that the decisions to prosecute in Federal court could be motivated by race. Without expert testimony, this Court cannot conclude that the defendants' evidence is explained by social phenomena."

The government again chose not to comply with the discovery order. The district court judge dismissed the indictments, but stayed the order pending appeal. The government timely appealed.

2. A divided panel of the court of appeals reversed. The majority constructed a three category test based on Redondo-Lemos, supra, and Bourgeois, supra. The dissent argued that the district court had not abused its discretion by ordering discovery on the claim of selective prosecution, and that the majority opinion created three highly artificial categories of cases.

3. The court of appeals granted rehearing en banc to resolve a conflict in its cases over the standards governing discovery when a defendant claims selective prosecution. By a 7-4 vote, the court held that the district court had not abused its discretion in ordering discovery in this case. The majority first held that a district court had discretion to order discovery on a claim of selective prosecution when the evidence provides a colorable basis for believing that discriminatory

prosecutorial selections have occurred. The existence of a colorable basis must be judged in light of all the evidence presented to the district court and not simply that offered by the defendant. "The United States Attorney must be given the chance to make whatever showing [he] deems appropriate to dispel the district judge's concerns." (app. at 8a)¹ However, where the government fails to make a showing sufficient to dispel those concerns, then a colorable basis remains even though the government has provided some evidence in response.

Explaining and refining the standard articulated in United States v. Bourgeois 964 F 2d 935, 940 (9th Cir.) cert. denied, 113 S. Ct. 290 (1992) the court of appeals held that:

a. The showing needed for discovery is less than that needed for a prima facie case. (app. at 9a)

b. Inadequately explained evidence of a significant statistical disparity in the race of those prosecuted suffices to show the colorable basis of discriminatory intent and effect that warrants discovery on a selective prosecution claim. (Id at 11a)

c. Defendants attempting to show a colorable basis that warrants discovery can only be expected to make good faith efforts to obtain whatever evidence is available, as well as to provide whatever evidence is in their possession. (Id at 12a)

The court noted that the colorable basis standard enunciated in its opinion is more in line with other circuits

¹ app. shall refer to the appendix to the petition for a writ of certiorari filed in this case.

and that it accommodates the twin but conflicting concerns that discovery in selective prosecution claims implicates: "The colorable basis standard ensures that the government will not be called to answer for its charging decisions as a result of frivolous and unwarranted allegations. At the same time, the standard ensures that defendants will not face unjustified hurdles at the discovery stage that will preclude them from demonstrating the existence of actual discrimination in the selection of defendants for criminal prosecution." (app. at 14a, 15a)

Chief Judge Wallace, concurring with the majority, agreed that the abuse of discretion standard permits the district court flexibility and voted to affirm. (Id at 30a) While noting that usually evidence of "others similarly situated" is needed to establish a prima face case, he nevertheless found that at the discovery stage, where there is evidence of a large enough number of prosecutions directed at a single race over a sufficiently long period of time, eventually there becomes a point where that evidence is sufficient to establish a colorable basis of selective prosecution. (Id at 31a)

The dissent found that the majority opinion "crafts a new standard" rather than clarifying the colorable basis standard and that it allowed discovery on a showing that discrimination "may" have occurred, rather than a definitive showing it had occurred. (app. dissent at 44a.) The dissent would require a specific showing of a similarly situated non-black offender who

was not prosecuted, rather than a colorable basis for the belief such an individual exists. (Id. at 46a.)

The dissent agreed that, in limited circumstances, a pattern of prosecution of a single racial group could provide circumstantial evidence of intent. (Id. at 58a) It disagreed that the statistical evidence presented to the district court here was sufficient to support the inference.

REASONS FOR DENYING THE PETITION

The Ninth Circuit Court of Appeals explained and refined its rulings in two previous discovery cases United States v. Bourgeois 964 F 2d 935 (9th Cir. 1992) United States v. Redondo-Lemos 995 F 2d 1296, 1302 (9th Cir. 1992) and in so doing made a ruling that is squarely in the mainstream of federal discovery law on the issue of when discovery can be ordered on a claim of selective prosecution in a criminal case.

By holding that defendants must present sufficient evidence to provide a colorable basis for believing that the government has engaged in discriminatory prosecution before a court may order discovery, the appellate court "ensures that the government will not be called to answer for its charging decisions as a result of frivolous and unwarranted allegations. At the same time the standard ensures that defendants will not face unjustified hurdles at the discovery stage that will preclude them from demonstrating the existence of actual

discrimination in the selection of defendants for criminal prosecution. " (app. at 14a, 15a)

1. The court of appeals relied not only on the statistical data presented by the Federal Public Defenders Office that showed that the federal government prosecuted only African-Americans for crack cocaine offenses, but also upon declarations demonstrating that white defendants were routinely prosecuted in state court for crack cocaine. The court found those declarations were probative evidence that like-situated defendants of a different race were not prosecuted in federal court (app. at 23a ft. 8)² The sum of the evidence presented to the district court places the holding of the court of appeals in the mainstream of its fellow circuits; that "inadequately explained evidence of a significant statistical disparity in the race of those prosecuted suffices to show the colorable basis of discriminatory intent and effect that warrants discovery on a selective prosecution claim".

The court of appeals had already stated in Redondo-Lemos supra 955 2d at 1301-02 that statistical disparities alone may suffice to provide the evidence of discriminatory intent that will establish a prima facie case of selective prosecution.

In Bourgeois, supra, the court held that to obtain discovery on a selective prosecution claim, a defendant must present specific

². The government petition ignores the finding of the court of appeals that the affidavits were probative evidence, while arguing at the same time that the affidavits had insufficient evidentiary value to be considered. (petition at 17, Footnote 1)

facts which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of the government. The court noted that it was a high threshold. (Id. at 939) The Bourgeois court found that the defendant had failed to establish a colorable basis for the first element of the claim that "others similarly situated have not been prosecuted" citing United States v. Wayte 470 U.S. 598, (1985)³ The instant opinion of the court of appeals acknowledges that the standard of evidence sufficient to trigger discovery must necessarily amount to less than the evidence needed to establish a prima facie case, and that defendants attempting to show a colorable basis that warrants discovery can only be expected to make good faith efforts to obtain whatever evidence is available, as well as to provide what evidence is in their possession. (app. at 12a) By holding that "inadequately explained evidence of a significant statistical disparity in the race of those prosecuted suffices to show the colorable basis of discriminatory intent and effect that warrants discovery on a selective prosecution claim," the court of appeals settles the tension between Redondo-Lemos and Bourgeois while at the same time upholding the colorable basis standard.

³ United States v. Wayte 470 U.S. 598 held that to succeed on a selective prosecution claim, the defendant bears the burden of showing "that others similarly situated have not been prosecuted and that the prosecution is based on an impermissible motive" and that selective prosecution claims are evaluated "according to equal protection standards". supra at 608-09 However Wayte did not address the issue of discovery on a claim of selective prosecution (Id at 605 ft. 5) (emphasis added)

In so doing, the court notes that the evidence of discriminatory prosecution presented to the district court in the discovery motion was much stronger than the ninth circuit held insufficient to initiate discovery in Bourgeois. (app at 16a) The opinion hardly supports petitioner's subsequent allegation that the court of appeals holding amounts to a "reformulation of legal principles".

The colorable basis standard is embraced by the third, sixth, seventh, tenth and D.C. circuits,⁴ while two circuits have a less-strict "non frivolous" standard⁵ and four apply a stricter prima facie showing test.⁶ The colorable basis test as clarified in the court's opinion takes the middle ground that "accommodates the twin but conflicting concerns" that discovery in selective prosecution claims implicate.

⁴ See In re Grand Jury, 619 F. 2d 1022, 1030 (3d Cir. 1980); United States v. Adams, 870 F. 2d 1140, 1146 (6th Cir. 1989); United States v. Heidecke, 900 F.2d 1155, 1159 (7th Cir. 1990); United States v. Armstrong, 48 F. 3d 1508, 1512 (9th Cir. 1995); United States v. P.H.E., Inc., 965 F. 2d 848, 860 (10th Cir. 1992); Attorney General of United States v. Irish People, Inc., 684 F. 2d 928, 948 (D.C. Cir. 1982).

⁵ See United States v. Greenwood, 796 F. 2d 49, 52 (4th Cir. 1986); United States v. Gordon, 817 F.2d 1538, 1540 (11th Cir. 1988).

⁶ See United States v. Penagarican-Soler, 911 F.2d 833, 838 (1st Cir. 1990); St. Germain of Alaska Easter Orthodox Catholic Church v. United States, 840 F. 2d 1087, 1095 (2d Cir. 1988); United States v. Johnson, 577 F. 2d 1304, 1308 (5th Cir. 1978); United States v. Parham, 16 F. 3d 844, 847 (8th Cir. (1994).

2. Petitioner's claim that the Ninth Circuit holding has a "substantial adverse impact on the prompt and effective enforcement of the criminal law" and "places the entire crack enforcement program for that District under a cloud" does not withstand scrutiny. The same district court judge that granted the discovery motion in the instant case denied a similar motion when the government properly responded with information regarding its policies. See United States v. Henry No. CR 94628-CBM (C.D. Cal June 26, 1995). Had the government complied with the concerns of the district court as expressed in its narrow discovery order, it could have avoided this controversy. As noted by petitioner, the affidavits prepared in United States v. Henry, supra, have satisfied discovery in other cases (petition at 23 ft. 3) Respondent is aware of no case where discovery has been ordered following that response by the government. In essence the government has put the issue to rest by complying with the district court's cautious and fact-appropriate original order.

In predicting the ramifications of the holding in this case to discovery as applied to other statutes, petitioner joins the dissent in ignoring the limited question and complaint presented to the district court judge: That African-American males are more frequently prosecuted for federal crack offenses, with the increased liability for punishment, than for state crack

offenses, where the punishment is remarkably less severe.⁷ That issue does not translate to crimes such as violation of immigration laws, where the only prosecutions occur under federal law. Similarly, the perceived danger of future challenges to white race and male gender prosecutions in LSD, pornography and prostitution cases does not take into account the specific phenomenon presented in this case to the district court judge and the court of appeals.

The unique problems involving the disparity of treatment of defendants for the use and sale of crack cocaine and powder cocaine in federal court, as well as the disparity of sentences for crack cocaine between federal and state courts, have attracted national attention and led to consideration by congress and the United States Sentencing Commission for reform in these areas.⁸ The evidence presented to the district court that federal authorities had targeted a racial minority made the narrow discovery order of the district court judge appropriate. District court judges routinely fashion discovery orders on a case-by-case basis, based on their observations, experience and the evidence presented to them. For that reason district court discovery orders are not disturbed absent a clear abuse of

⁷. Respondent Aaron Hampton is facing mandatory life imprisonment without possibility of parole in the instant federal case. Had the case been filed "across the street" in the Los Angeles County Court under the state statute, Mr. Hampton would be facing a maximum of approximately six years in actual custody.

⁸ See U.S. Sentencing Commission: Materials Concerning Sentencing for Crack Cocaine Offenses, 57 Criminal Law Reporter 2127, 2131 (May 31, 1995)

discretion. United States v. Balough 820 F. 2d 1485,1491 (9th Cir. 1987).⁹

The court of appeals emphasized that its discovery holding does not reach the ultimate issue of whether defendants have in fact demonstrated the existence of selective prosecution. (app. at 8a) It found that the evidence necessary to obtain a discovery order must obviously be substantially less than that needed to prove the charge itself. Nevertheless the appellate court insists upon evidence that provides a colorable basis for believing that discriminatory prosecutorial decisions have occurred. The existence of a colorable basis must be judged in light of all the evidence presented to the district court and not simply that offered by the defendant. "The United States Attorney must be given the chance to make whatever showing he deems appropriate to dispel the district court's concerns." (app. at 8a)

3. Finally, the court of appeals colorable basis standard of review for discovery fits squarely within the parameters of cases decided by this Court, particularly where equal protection and racial classifications are involved.

⁹. Other circuits also review for abuse of discretion See e.g. United States v. Heidecke, 900 F. 2d 1155,1162 (7th Cir.1990); United States v. Hintzman, 806 F. 2d 840, 846 (8th Cir. 1986); United States v. Greenwood, 796 F. 2d 49,52 (4th Cir. 1986); United States v. Berrios, 501 F. 2d 1207, 1212 (2nd Cir. 1974); United States v. Berrigan, 482 F. 2d 171, 181 (3rd Cir. 1973)

Although the defendant bears the burden of proving purposeful discrimination, [s]he may rely upon circumstantial evidence of invidious intent based upon proof of a disproportionate impact in the application of the law. Batson v. Kentucky 476 U.S. 79, (1986) Arlington Height v. Metropolitan Housing Development Corp. 429 U.S. 252, 266 (1977) Washington v. Davis 426 U.S. 229, 242 (1976). This court held in Arlington Heights v. Metropolitan Housing Development Corp. supra, 429 US. 252, 266 that a direct showing of discriminatory intent is not always necessary to make out an equal protection claim; under ordinary equal protection standards, a claimant may prove discriminatory purpose circumstantially. (Id at 266) "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face". (Id at 266) See also Yick Wo v. Hopkins 118 U.S. 356, 30 (1886) Gomillion v. Lightfoot 364 U.S. 339 (1960) Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of impact as may be available. Washington v. Davis, supra 426 U.S. 229, 242 (1976)

Petitioner unwisely attempts to join the standard applicable to a motion to dismiss for selective prosecution with the standard applicable to a motion for discovery. The district court and the court of appeal ruled only on the latter.

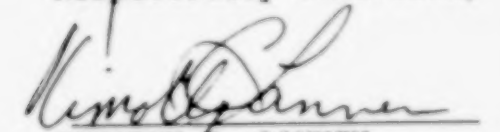
By initiating limited discovery based upon the evidence presented, the district court acted properly within its

discretion. The court of appeals correctly affirmed that ruling using the colorable basis standard for discovery in a criminal case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

I, TIMOTHY C. LANNEN, a member of the Bar of this Court, hereby certify that on August 24, 1995, Respondent's OPPOSITION TO PETITION FOR CERTIORARI was served upon counsel listed below by depositing copies of same in the United States mail, with first class postage prepaid, addressed as follows:

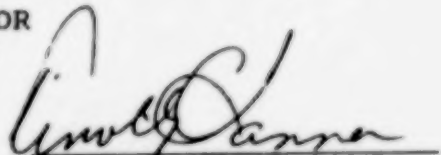
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No. 95-157

SUPREME COURT FILED AUG 25 1995 OFFICE OF THE CLERK
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRISTOPHER LEE ARMSTRONG, ET. AL.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT ROBERT ROZELLE

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25 pp

QUESTIONS PRESENTED

1. What is the legal standard that must be met in order for a defendant in criminal prosecution to be entitled to discovery on a selective prosecution claim.
2. Whether a defendant in making a discovery motion on a selective prosecution claim must in every case present evidence that the government has failed to prosecute others who are similarly situated, or is it sufficient if the defendant's discovery motion raises only a reasonable inference that the government has failed to prosecute others who are similarly situated.

TABLE OF CONTENTS

	<u>Page</u>
OPINIONS BELOW	1
JURISDICTION	1
PARTIES TO THE PROCEEDING	2
STATEMENT OF THE FACTS	2
ARGUMENT	
I. <u>THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A DISCOVERY MOTION ON A SELECTIVE PROSECUTION CLAIM BECAUSE A PARTY SEEKING SUCH DISCOVERY IS ONLY REQUIRED TO SHOW A COLORABLE BASIS FOR HIS CLAIM OF SELECTIVE PROSECUTION AND IS NOT REQUIRED TO SHOW A PRIMA FACIE CASE OF SELECTIVE PROSECUTION</u>	5
CONCLUSION	18
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Arlington Heights v. Metropolitan Housing Development Corp.</u> , 429 U.S. 252, 266 (1977)	14
<u>Attorney General of United States v. Irish People, Inc.</u> , 684 F.2d 928, 948 (D.C. Cir. 1982)	7
<u>Batson v. Kentucky</u> , 476 U.S. 79, 93 (1986)	11, 14
<u>Bolling v. Sharpe</u> , 347 U.S. 497 (1954)	13
<u>Gomillion v. Lightfoot</u> , 364 U.S. 339 (1960)	14
<u>Hirabayashi v. United States</u> , 320 U.S. 81, 100 (1943)	13
<u>In re Grand Jury</u> , 619 F.2d 1022, 1030 (3d Cir. 1980)	7
<u>Loving v. Virginia</u> , 388 U.S. 1 (1967)	13, 15
<u>McCleskey v. Kemp</u> , 481 U.S. 279 (1987)	12
<u>Miller v. Johnson</u> , No. 94-631 (June 29, 1995)	13
<u>Regents of Univ. of California Bakke</u> , 438 U.S. 265, 387-401 (1978)	15
<u>Shaw v. Reno</u> , 509 U.S. ____ (1993)	13
<u>St. Germain of Alaska Easter Orthodox Catholic Church v. United States</u> , 840 F.2d 1087, 1095 (2d Cir. 1988)	7
<u>United States v. Adams</u> , 870 F.2d 1140, 1146 (6th Cir. 1989)	7
<u>United States v. Armstrong</u> , 21 F.3d 1431 (9th Cir. 1994)	5, 9
<u>United States v. Armstrong</u> , 48 F.3d 1501, 1512 (9th Cir. 1995)	5, 7-10, 18
<u>United States v. Bourgeois</u> , 964 F.2d 935, 939 (9th Cir. 1992)	7
<u>United States v. Clary</u> , 34 F.3d 709 (8th Cir. 1994)	15
<u>United States v. Clary</u> , 846 F.Supp. 768	15

TABLE OF AUTHORITIES - Continued

<u>Cases</u>	<u>Page</u>
<u>United States v. Gordon</u> , 817 F.2d 1538, 1540 (11th Cir. 1988)	7
<u>United States v. Greenwood</u> , 796 F.2d 49, 52 (4th Cir. 1986)	7
<u>United States v. Heidecke</u> , 900 F.2d 1155, 1159 (7th Cir. 1990)	7
<u>United States v. Henry</u> , No. CR94-628-CBM (June 26, 1995 Order)	18
<u>United States v. Johnson</u> , 577 F.2d 1304, 1308 (5th Cir. 1978)	7
<u>United States v. Marshall</u> , 56 F.3d 1210 (9th Cir. 1995)	17
<u>United States v. Nixon</u> , 418 U.S. 683, 702 (1974)	6
<u>United States v. Nolan Reese</u> , No. 94-50206 (July 26, 1995)	17
<u>United States v. P.H.E., Inc.</u> , 965 F.2d 848, 860 (10th Cir. 1992)	7
<u>United States v. Parham</u> , 16 F.3d 844, 847 (8th Cir. (1994)	7
<u>United States v. Penagarican-Soler</u> , 911 F.2d 833, 838 (1st Cir. 1990)	7
<u>United States v. Redondo-Lemos</u> , 27 F.3d 439 (9th Cir. 1994)	11
<u>United States v. Redondo-Lemos</u> , 955 F.2d 1296 (9th Cir. 1992)	10
<u>United States v. Taylor</u> , 487 U.S. 326, 336 (1987)	6
<u>Washington v. Davis</u> , 426 U.S. 229, 242 (1976)	13, 14
<u>Wayte v. United States</u> , 470 U.S. 598, 608 (1985)	6, 10, 13
<u>Yick Wo v. Hopkins</u> , 118 U.S. 356 (1886)	13, 14

Statutes

18 U.S.C. § 924(c)	2
21 U.S.C. § 841(a)(1)	2
21 U.S.C. § 841(b)	2, 3
21 U.S.C. § 846	2, 3
28 U.S.C. § 1254(1)	2
Cal. Health & Safety Code § 11351.5 (Deering 1993)	2

Miscellaneous

<u>U.S. Sentencing Commission: Materials Concerning Sentencing</u>	
<u>For Crack Cocaine Offenses</u> , 57 Criminal Law Reporter	
2127, 2131 (May 31, 1995)	16

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

No. 95-157

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRISTOPHER LEE ARMSTRONG, ET. AL.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT ROBERT ROZELLE

OPINIONS BELOW

The opinion of the en banc court of appeals is reported at 48 F.3d 1508. The panel opinion of the court of appeals is reported at 21 F.3d 1431.

JURISDICTION

The judgement of the en banc court of appeals was entered on March 2, 1995. By order dated June 21, 1995, Justice O'Connor extended the time within which to file a petition for a writ of

certiorari to and including July 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PARTIES TO THE PROCEEDING

The petitioner is the United States of America. The respondents are Christopher Lee Armstrong, Robert Rozelle, Aaron Hampton, Freddie Mack, and Shelton Auntwan Martin.

STATEMENT OF THE FACTS

In April of 1992, respondents Christopher Armstrong, Aaron Hampton, Freddie Mack, Shelton Martin, and Robert Rozelle were charged with federal offenses for their alleged involvement in the distribution of cocaine base, known colloquially as "crack" or "rock". The charges stemmed from an investigation conducted under the direction of a joint state and federal task force comprised of detectives from the Inglewood Police Department and agents from the Bureau of Alcohol, Tobacco, and Firearms.

All five respondents were charged with conspiracy to distribute cocaine base under 21 U.S.C. § 846. Some of the respondents were also charged with selling cocaine base under 21 U.S.C. § 841(a)(1) and using firearms in connection with drug trafficking in violation of 18 U.S.C. § 924(c). The decision to charge the respondents with federal rather than California state offenses was significant. Federal law imposes a minimum sentence of 10 years and a maximum of life for those convicted of selling more than 50 grams of cocaine bases. 21 U.S.C. § 841(b). By contrast, under California law, the minimum sentence for that offense is three years and the maximum is five. Cal. Health &

Safety Code § 11351.5 (Deering 1993). All five respondents are Black.

Respondents filed a motion for discovery on a claim of selective prosecution, arguing that the decision to prosecute on federal charges rather than state charges was based on race. To support the motion for discovery, the respondent offered into evidence a study of every case involving a charge under 21 U.S.C. §§ 841 and 846 that the Federal Public Defender's Office for the Central District of California had closed in 1991. The study showed that in all 24 such cases the defendants had been Black.

The district court granted the motion for discovery. Specifically, the district judge ordered the government: (1) provide a list of all cases from the prior three years in which the government charged both cocaine base offenses and firearms offenses; (2) identify the race of the defendants in those cases; (3) identify whether state, federal, or joint law enforcement authorities investigated each case; and (4) explain the criteria used by the U.S. Attorney's Office for deciding whether to bring cocaine base cases to the federal court.

The government chose not to comply with the discovery order and instead filed a motion for reconsideration. In support of its motion, the government provided a list of all defendants charged with violation of 21 U.S.C. §§ 841 and 846 over a three year period (without any racial breakdown) as well as declarations by three law enforcement officers and two Assistant United States Attorneys. The declarations asserted that

socioeconomic factors led certain ethnic and racial groups to be particularly involved with the distribution of certain drugs and that Blacks were particularly involved in the Los Angeles-area crack trade. The declarations also contained a description of some of the race neutral factors on which federal prosecutors based their charging decisions for crack-related offenses. The factors specifically referred to were the strength of the evidence, the deterrent value of bringing the charge, the federal interest in the prosecution, and the suspect's criminal history.

District Judge Consuelo Marshall denied the motion for reconsideration. She stated her reasons for the denial at the hearing: "The statistical data provided by the Defendant raises a question about the motivation of the government which could be satisfied by the government disclosing its criteria, if there is any criteria, for bringing this case and others like it in Federal court. Without this criteria the statistical data is evidence and does suggest that the decisions to prosecute in Federal court could be motivated by race. Without expert testimony, this Court cannot conclude that the defendants' evidence is explained by social phenomena."

The government again chose not to comply with the discovery order. The respondents moved to dismiss the indictment as a sanction. The district judge dismissed the indictments, but stayed the order pending appeal. The government timely appealed.

The original three judge panel reversed, finding that the respondents' study did not establish a colorable basis for

ordering discovery because it did not show that others similarly situated were not prosecuted. United States v. Armstrong, 21 F.3d 1431 (9th Cir. 1994). A rehearing was granted and an en banc court affirmed the discovery order and dismissal, finding that the respondents' study did establish a colorable basis for believing that similarly situated members of other races were not prosecuted and there was no abuse of discretion. United States v. Armstrong, 48 F.3d 1508 (9th Cir. 1995).

ARGUMENT

I.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A DISCOVERY MOTION ON A SELECTIVE PROSECUTION CLAIM BECAUSE A PARTY SEEKING SUCH DISCOVERY IS ONLY REQUIRED TO SHOW A COLORABLE BASIS FOR HIS CLAIM OF SELECTIVE PROSECUTION AND IS NOT REQUIRED TO SHOW A PRIMA FACIE CASE OF SELECTIVE PROSECUTION.

The respondent Robert Rozelle urges the court to deny the petition for writ of certiorari filed by the government. The narrow holding of the Ninth Circuit in this case is that the district court did not abuse its discretion in granting a discovery motion on a selective prosecution claim.¹ District

¹ The government raises the concern that the decision of the court of appeals in this case changed the law concerning the requirements for a prima facie case of selective prosecution. (Gov't Br. p. 18) The court of appeal opinion states that "statistical disparities alone may suffice to provide the evidence of discriminatory effect and intent that will establish a prima facie case of selective prosecution." United States v. Armstrong, 48 F.3d 1508, 1513 (9th Cir. 1995). The government argues that this language means that the court held

courts typically have wide discretion in ruling on discovery motions. Wayte v. United States, 470 U.S. 598, 624 (1985) (Marshall, J., dissenting); United States v. Nixon, 418 U.S. 683, 702 (1974). Appellate review for abusive discretion requires the Court to consider "the bounds of that discretion and the principles that guide its exercise" but such review "necessarily would be limited." United States v. Taylor, 487 U.S. 326, 336 (1987).

Both the government and the respondents agreed that the legal test for obtaining discovery on a selective prosecution claim is the "colorable basis" test. (Gov't Br. pp. 19-20) This is consistent with Justice Marshall's acknowledgment in his dissenting opinion in Wayte v. United States, 470 U.S. 598, 623 (1985) that a defendant may obtain discovery "if he can show that he has a 'colorable basis' for a selective prosecution claim." The Court of Appeal in this case concluded that "Discovery may be

that a prima facie case of selective prosecution could be established without evidence that similarly situated persons of a different race have not been prosecuted. (Gov't Br. p. 18) Whether this language in the Armstrong opinion is in conflict with this Court's decision in Wayte v. United States, 470 U.S. 598 (1985) is an issue that is not directly raised in this case. First, the court of appeal in this case only ruled upon the granting of a discovery motion on a selective prosecution claim. It did not rule on and was never called upon to rule on the merits of a motion to dismiss the indictment on the grounds that the respondents had been selectively prosecuted in violation of their right to equal protection of the laws. Secondly, the government in its petition for writ of certiorari raises only an issue relating to the granting of a discovery motion on a selective prosecution claim and has not sought review by this court on the question of what is required in order to establish a prima facie case of selective prosecution warranting the dismissal of an indictment.

ordered when the evidence provides a colorable basis for believing that discriminatory prosecutorial selections have occurred." United States v. Armstrong, 48 F.3d 1501, 1512 (9th Cir. 1995). "The colorable basis standard is met by 'some evidence tending to show the essential elements of the claim.' United States v. Heidecke, 900 F.2d 1155, 1159 (7th Cir. 1990)." (*Ibid.*) In further defining the term 'some evidence' the court of appeal stated that "to obtain discovery on a selective prosecution claim, a defendant must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of government actors." (*Ibid.* at pp. 1512-1513, citing United States v. Bourgeois, 964 F.2d 935, 939 (9th Cir. 1992). The majority of the Circuits are in accord with this view.²

² The majority of the Circuits, the Third, Sixth, Seventh, Ninth, Tenth and District of Columbia have adopted the "colorable basis" test. In re Grand Jury, 619 F.2d 1022, 1030 (3d Cir. 1980); United States v. Adams, 870 F.2d 1140, 1146 (6th Cir. 1989); United States v. Heidecke, 900 F.2d 1155, 1159 (7th Cir. 1990); United States v. Armstrong, 48 F.3d 1508, 1512 (9th Cir. 1995); United States v. P.H.E., Inc., 965 F.2d 848, 860 (10th Cir. 1992); Attorney General of United States v. Irish People, Inc., 684 F.2d 928, 948 (D.C. Cir. 1982). Four Circuits, the First, Second, Fifth, and Eighth, apply a stricter "prima facie" showing test. United States v. Penagarican-Soler, 911 F.2d 833, 838 (1st Cir. 1990); St. Germain of Alaska Eastern Orthodox Catholic Church v. United States, 840 F.2d 1087, 1095 (2d Cir. 1988); United States v. Johnson, 577 F.2d 1304, 1308 (5th Cir. 1978); United States v. Parham, 16 F.3d 844, 847 (8th Cir. 1994). Two Circuits, the Fourth and Eleventh, have adopted the "non-frivolous" standard. United States v. Greenwood, 796 F.2d 49, 52 (4th Cir. 1986); United States v. Gordon, 817 F.2d 1538, 1540 (11th Cir. 1988).

The essence of the government's claim is that the factual presentation made by the respondents in the district court did not establish a colorable basis of selective prosecution. The government argues that before a discovery motion for selective prosecution may be granted, the moving party must present specific instances or cases where other persons similarly situated have not been prosecuted. The government argues that the respondents' study by the Federal Public Defender's office in Los Angeles that showed that each defendant in the 24 cocaine base cases closed by that office in 1991 had been Black was an insufficient showing. In essence the government is arguing that in order to obtain discovery on a selective prosecution claim, respondents were required to show at least one case where a White defendant committed a cocaine base criminal offense and was not prosecuted for that offense in federal court, where the penalties for those offenses are higher than in state court.

However, if the respondents had evidence of such a case, there would be no need to bring a discovery motion. Respondents could simply proceed to the second step and file a motion to dismiss the indictment for selective prosecution. The government's argument fails to recognize the fundamental difference between a discovery motion on a selective prosecution claim and a motion to dismiss the indictment for selective prosecution. As the Court of Appeal in this case correctly points out: "The standard for a discovery showing is lower than that for a prima facie case." United States v. Armstrong, 48

F.3d 1508, 1513 (9th Cir. 1995). As Justice Reinhardt noted in his dissenting opinion in the original panel decision: "If they could make such a showing without any discovery, there would be no need for discovery in the first place." United States v. Armstrong, 21 F.3d 1431, 1439 (9th Cir. 1994) (Reinhardt, J. dissenting). While proof of a particular case of one White defendant who commits a cocaine base offense and is not prosecuted in federal court may arguably be necessary for a motion to dismiss the indictment for a selective prosecution, it is not an essential requirement for the granting of a discovery motion on selective prosecution.³ As Justice Marshall noted in the Wayte decision, "most of the relevant proof in selective prosecution cases will normally be in the Government's hands." Wayte v. United States, 470 U.S. 598, 624 (1985).

A claim of selective prosecution is to be judged according to ordinary equal protection standards and will require proof that an enforcement system "had a discriminatory effect and that

³ As noted in footnote 1, the court of appeal decision in this case states that even in establishing a prima facie case of selective prosecution in a motion to dismiss the indictment, it is not absolutely essential that the defendant present evidence of a particular case where others similarly situated have not been prosecuted. Statistical disparity alone may in some cases suffice to provide the evidence of discriminatory effect and intent. United States v. Armstrong, 48 F.3d 1508, 1513 (9th Cir. 1995). Thus, respondent does not concede that proof of a specific case where others similarly situated have not been prosecuted is absolutely essential to prove the merits of the claim of selective prosecution. However, as noted above, this issue is not directly raised in this case. Resolution of this issue is more appropriately reserved for review of a ruling on a motion to dismiss the indictment for selective prosecution and not upon review of the granting of a discovery motion on a selective prosecution claim.

it was motivated by a discriminatory purpose." Wayte v. United States, 470 U.S. 598, 608 (1985). To obtain discovery on such a claim, a party need only show "some evidence tending to show the essential elements of the claim." United States v. Armstrong, 48 F.3d 1508, 1512 (9th Cir. 1995). In order for a discovery motion to be granted, it does not require proof of the elements of a selective prosecution claim to the same extent as would be needed on a motion to dismiss the indictment. Rather, a colorable basis can exist if a defendant's showing on a discovery motion raises a reasonable inference that he may be the victim of selective prosecution. For example, in one case a court stated that a discovery motion on a selective prosecution claim may be granted where the defendant presents "enough evidence to demonstrate a reasonable inference of invidious discrimination." United States v. Redondo-Lemos, 955 F.2d 1296, 1302 (9th Cir. 1992).⁴

⁴ In United States v. Redondo-Lemos, 955 F.2d 1296 (9th Cir. 1992) the court of appeal reviewed a district judge's finding that the United States attorney was committing equal protection violations by treating male drug couriers more harshly in plea bargaining than similarly situated females. The court noted that a district judge who perceives a pattern of invidious enforcement has ample authority under the court's supervisory powers to raise the matter sua sponte. The court also held that if invidious discrimination is proven, one remedy could be a reduction of a defendant's sentence. However, on the record presented, the court found no evidence of intentional discrimination and reversed and remand for further proceedings. The court stated that a district judge's own observations of disparate impact establishes a prima facie case of selective prosecution, but without more, is an insufficient basis for finding that the prosecutor was motivated by a discriminatory purpose. Upon remand, the district court conducted an evidentiary hearing concerning the U.S. Attorney's office policy concerning plea bargaining and its relationship to gender. The district court again found gender discrimination and reduced the sentences. On the government's appeal the Ninth Circuit again

The "reasonable inference" concept arises directly from this Court's reasoning in Batson v. Kentucky, 476, U.S. 79, 93-97 (1986). In Batson, this Court held that it is a violation of equal protection for a prosecutor in a criminal case to use his preemptory challenges to remove trial jurors on the basis of their race. Recognizing that an equal protection violation would require purposeful discrimination, the Court stated that a pattern of strikes against Black jurors may give rise to an "inference of purposeful discrimination." (Ibid. at p. 96). The burden then shifts to the prosecution to come forward with a neutral explanation for challenging Black jurors. (Ibid. at p. 97). The same logical approach exists in respondents' case, where the showing on the discovery motion raised a reasonable inference that prosecutors were selecting only Black defendants for prosecution in federal court for cocaine base offenses where the penalties were higher than state court. The trial court, finding a colorable basis of selective prosecution, granted the discovery motion and ordered the government to respond with an explanation which would either prove or disprove the claim of purposeful discrimination.

The government argues that the respondents' showing on the discovery motion was insufficient. The government states that evidence of a study by the Federal Public Defender's Office in

reversed the district court, ruling that the evidence did not support the district judge's finding of gender-based selective prosecution. United States v. Redondo-Lemos, 27 F.3d 439 (9th Cir. 1994).

Los Angeles showing that each defendant in 24 cocaine base cases closed by that office 1991 have been Black, does not show purposeful discrimination or selective prosecution. It is suggested that similar racial statistics exist in cases relating to White defendants in prosecutions for trafficking in LSD, antitrust violations, pornography and prostitution. The government relies upon this Court's decision in McCleskey v. Kemp, 481 U.S. 279 (1987) in support of their claim that respondents' statistical showing is unpersuasive.

In the McCleskey case, this court held that statistics establishing a higher percentage of Black defendants receiving the death penalty in the state of Georgia did not alone prove that the decision makers in those cases acted with a discriminatory purpose in violation of the equal protection clause. However, the McCleskey case was not a case involving the issue of discovery. It was a ruling on the merits of an argument made to vacate a death sentence in a murder case. The respondents in this case have not yet made a motion to dismiss the indictment for selective prosecution. They have only made a motion for discovery. Even if the statistical evidence is found to be insufficient to prove the merits of a selective prosecution claim, it does not follow that statistical evidence is valueless. If the statistical evidence raises a reasonable inference of selective prosecution, then it should be sufficient to warrant the granting of a discovery motion on a selective prosecution claim.

Much of what the government states in its brief concerning the law of selective prosecution is correct. However, the need to study the law of selective prosecution, in the context of a discovery motion, is simply to see if the discovery motion is focused in the right direction. A selective prosecution claim, as a defense to a criminal prosecution, is to be evaluated according to ordinary equal protections standards and to prevail on a claim, a defendant must prove an enforcement system "had a discriminatory effect and that it was motivated by a discriminatory purpose." Wayte v. United States, 470 U.S. 598, 608 (1985); Washington v. Davis, 426 U.S. 229 (1976); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

A central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. Washington v. Davis, 426 U.S. 229, 239 (1976). The Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. Bolling v. Sharpe, 347 U.S. 497 (1954). Classifications of citizens solely on the basis of race "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Hirabayashi v. United States, 320 U.S. 81, 100 (1943). Accord, Loving v. Virginia, 388 U.S. 1, 11 (1967); Shaw v. Reno, 509 U.S. ___ (1993); Miller v. Johnson, No. 94-631 (June 29, 1995).

Although the burden of proving purposeful discrimination is on the defendant, Batson v. Kentucky, 476 U.S. 79, 93 (1986), the defendant may rely upon circumstantial evidence of invidious intent based upon proof of a disproportionate impact in the application of the law. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976). "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." Washington v. Davis, 426 U.S. 229, 242 (1976). "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977). See also, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

In respondents' case, the claim made at the discovery hearing was that Black defendants arrested for cocaine base offenses are being selected on the basis of their race for prosecution in federal court rather than state court because the penalties in federal court are higher than those in state court. Central to their showing on the discovery motion was a study by the Federal Public Defender's Office in Los Angeles showing that each defendant in 24 cocaine base cases closed by that office in 1991 had been Black and that once again five Black male

defendants were being charged with cocaine base offenses in federal court rather than state court.

In response to the government's argument that these statistics prove nothing and that White defendants in antitrust prosecutions could make a similar showing, respondent makes two important observations. First, Black Americans are a racial minority in the United States that historically have been subjected to racial discrimination. The history of this discrimination and its origins are fully detailed in Justice Marshall's dissenting opinion in Regents of Univ. of California Bakke, 438 U.S. 265, 387-401 (1978). See also, United States v. Clary, 846 F.Supp. 768 (E.D. Mo. 1994) overruled in United States v. Clary, 34 F.3d 709 (8th Cir. 1994). As recently as 1967, this Court was called upon to strike down racially discriminatory statutes effecting Black Americans. Loving v. Virginia, 388 U.S. 1 (1967). Thus, it is highly unlikely that a showing of statistics relating to White defendants in antitrust prosecutions would have any persuasive effect.

Secondly, the crime involved in this case is the federal criminal prosecution of offenses relating to cocaine base, also known as "rock cocaine" or "crack". Respondent is not aware of any similar claim of selective prosecution being made by Black defendants in relation to any other class of crime.⁵ In a

⁵ The government in its brief refers to several other cases being prosecuted in California where the charged crime is illegal entry following deportation in violation of 8 U.S.C. 1326 and where the defendants are all Hispanic. The government claims that in light of the decision of the court of

recently submitted report to Congress by the United States Sentencing Commission, it was recommended that the higher sentences for cocaine base offenders in the Sentencing Guidelines be reduced and brought into proportion with the sentences imposed upon persons convicted of narcotic offenses involving powder cocaine. Of particular interest is the statement of the commission majority in support of recommended changes in federal cocaine sentencing policy, where the commissioners comment on perceived racial discrimination involving cocaine base prosecutions in federal court and Black defendants. The commission report states:

"In the course of our study, we were faced with clear evidence that crack cocaine penalties are imposed largely on African-Americans. Almost 90 percent of federal crack offenders are Black. This disproportionate impact creates a perception of unfairness and raises allegations of racial bias. Everyone concerned with the legitimacy of the criminal justice system - and with the willingness of all citizens to accept its judgment as fair and final - must be troubled by allegations of unfairness, particularly racial discrimination." U.S. Sentencing Commission: Materials Concerning Sentencing For Crack Cocaine Offenses, 57 Criminal Law Reporter 2127, 2131 (May 31, 1995).

appeal in this case, the defendants in these immigration cases may be able to prevail on discovery motions involving a claim of selective prosecution by relying upon statistics establishing that most defendants who are prosecuted in California are Hispanic. Respondents suggest that there are too many variables between this case and the cases involving Hispanic defendants charged with immigration law violations, for reference to those cases to be of any assistance to the Court. Whether the defendants in those cases have meritorious discovery claims or not should await an appropriate case involving Hispanic defendants and immigration law violations.

Thus the concerns raised by respondents' discovery motion are not an isolated concerns raised only in the context of this case. They reflect a growing concern that the weight of the harsh penalties for cocaine base offenses is falling almost exclusively upon Black defendants. Whether this is by design, or by accident, or whether Black defendant's selected themselves by being the only one's committing the crime, is an issue to be resolved at a hearing on the merits of a selective prosecution claim. This case involves only a discovery motion. The showing made by respondents clearly raised sufficient concern to warrant further inquiry by way of court ordered discovery. A district court judge has discretion broad enough to order that discovery. There was no abuse of discretion warranting this court's intervention.⁶

⁶ The government has raised the concern that the opinion of the court of appeals in this case may have a substantial adverse impact on the administration of criminal cases in the Ninth Circuit. Respondents believe that the exact nature of that impact may be overstated. Although many more selective prosecution discovery motions may have been filed in response to the court of appeals' decision in this case, it still remains a fact that very few such motions, other than in this case, have been granted.

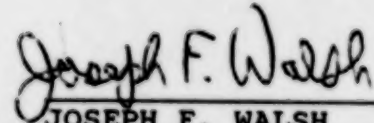
In United States v. Marshall, 56 F.3d 1210 (9th Cir. 1995) a Black defendant in a cocaine base prosecution filed the identical discovery motion utilizing the same statistical information as in respondent's case, but a district court judge in the Central District of California denied the discovery motion and the Ninth Circuit court of appeals affirmed the denial of the motion, finding no abuse of discretion.

In United States v. Nolan Reese, No. 94-5026 (July 26, 1995) a similar selective prosecution discovery motion was brought by Black defendants in a cocaine base prosecution in the Southern District of California in San Diego. The defendants presented similar statistics showing a disproportionate number of Black defendants being prosecuted in federal court for cocaine base offenses. The district court denied the discovery motion.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,



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The Ninth Circuit reversed and remanded the case for reconsideration of the motion based upon its ruling in this case, United States v. Armstrong, 48 F.3d 1508 (9th Cir. 1995). In reversing, the court expressly stated that the court of appeal was not deciding how the district court should exercise its discretion, implying that even under the Armstrong decision, the motion could be denied.

Finally, in United States v. Henry, No. CR94-628-CBM (June 26, 1995 Order), the case in which more than 1000 hours of work by attorneys was needed to prepare data and affidavits in order to respond to a discovery motion, it appears as though the District Court denied the discovery motion. Indeed, newspaper reports concerning the case indicate that one of the defendants was Black, the charge involved trafficking in cocaine base, the district court judge was the same district court judge who ruled in respondents' case, and yet the district court in its discretion denied the motion for a discovery. "Judge Rejects Claims of Bias in Crack Case," Los Angeles Times at pp. A3, A11 (June 27, 1995).

CERTIFICATE OF SERVICE

I, JOSEPH F. WALSH, a member of the Bar of this Court, hereby certify that on August 24, 1995, BRIEF FOR RESPONDENT ROBERT ROZELLE TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT was served upon counsel listed below by depositing copies of same in the United States mail, with first class postage prepaid, addressed as follows:

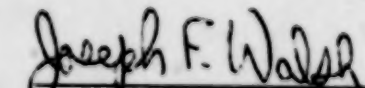
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No. 95-157

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

UNITED STATES OF AMERICA, PETITIONER
vs.
CHRISTOPHER LEE ARMSTRONG, ET. AL., RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- A. DOES A NARROW ORDER FOR DISCOVERY CONSTITUTE AN ABUSE OF DISCRETION WHERE THE DISTRICT COURT IS PRESENTED WITH EVIDENCE PROVIDING A COLORABLE BASIS TO BELIEVE SELECTIVE PROSECUTION MAY HAVE OCCURRED?
- B. TO OBTAIN DISCOVERY, MUST A DEFENDANT CONCLUSIVELY PROVE THE ULTIMATE ISSUES SUPPORTING DISMISSAL ON A CLAIM OF SELECTIVE PROSECUTION?

TABLE OF CONTENTS

QUESTIONS PRESENTED

A. DOES A NARROW ORDER FOR <u>DISCOVERY</u> CONSTITUTE AN ABUSE OF DISCRETION WHERE THE DISTRICT COURT IS PRESENTED WITH EVIDENCE PROVIDING A COLORABLE BASIS TO BELIEVE SELECTIVE PROSECUTION MAY HAVE OCCURRED?	i
B. TO OBTAIN DISCOVERY, MUST A DEFENDANT CONCLUSIVELY PROVE THE ULTIMATE ISSUES SUPPORTING <u>DISMISSAL</u> ON A CLAIM OF SELECTIVE PROSECUTION?	i
I. <u>OPINIONS BELOW</u>	1
II. <u>JURISDICTION</u>	2
III. <u>STATEMENT OF THE CASE</u>	2
IV. <u>REASONS TO DENY THE PETITION</u>	11
A. THE ISSUE PRESENTED IS WHETHER THE NARROW DISCOVERY ORDER ISSUED BY THE DISTRICT COURT CONSTITUTED AN ABUSE OF DISCRETION.	11
i. The District Court Did Not Abuse Its Discretion And Applied The Appropriate Standard In Ordering Discovery.	11
ii. The Court Of Appeals Did Not Hold That The Evidence Proffered In Support Of The Discovery Request Would Meet The Standard For Dismissal.	16
iii. This Case Does Not Present An Important Question Of Federal Law And It Has Not Had A Major Impact On The Administration Of Justice.	17
B. THE COURT OF APPEALS RULING HAS NOT CREATED A CONFLICT AMONG THE CIRCUITS -- ALL CIRCUITS AGREE THAT A DEFENDANT MUST PROVIDE EVIDENCE OF SIMILARLY SITUATED NON-PROSECUTED INDIVIDUALS TO OBTAIN DISCOVERY ON A CLAIM OF SELECTIVE PROSECUTION.	21
V. <u>CONCLUSION</u>	28

TABLE OF AUTHORITIES

Cases	Page
<u>Arlington Heights v. Metropolitan Housing Development Corp.</u> , 429 U.S. 252 (1977)	8, 16, 23
<u>Batson v. Kentucky</u> , 476 U.S. 79 (1986)	8, 22, 23
<u>Gomillion v. Lightfoot</u> , 364 U.S. 339 (1960);	17
<u>United States v. Taylor</u> , 487 U.S. 326 (1988)	15
<u>Wade v. United States</u> , 504 U.S. 181 (1992)	16
<u>Washington v. Davis</u> , 426 U.S. 229 (1976)	12, 17
<u>Wayte v. United States</u> , 470 U.S. 598 (1985)	8, 12, 15, 23
<u>McClesky v. Kemp</u> , 481 U.S. 279 (1987)	15
<u>Regents of Univ. of California v. Bakke</u> , 438 U.S. 265 (1978)	18
<u>Yick Wo v. Hopkins</u> , 118 U.S. 356 (1886)	12, 17
<u>Allen v. City of Beverly Hills</u> , 911 F.2d 367 (9th Cir. 1990)	9
<u>Attorney General v. Irish People, Inc.</u> , 684 F.2d 928 (D.C. Cir. 1982), cert. denied, 459 U.S. 1172 (1983)	24
<u>Diaz v. San Jose Unified School District</u> , 733 F.2d 660 (9th Cir. 1984) (en banc), cert. denied, 471 U.S. 1065 (1985)	8, 23
<u>St. German of Alaska Eastern Orthodox Catholic Church v. United States</u> , 840 F.2d 1087 (2d Cir. 1988)	8
<u>United States v. Bourgeois</u> , 964 F.2d 935 (9th Cir. 1992)	2, 5-9, 22, 24

<u>United States v. Cooks</u> , 52 F.3d 101 (5th Cir. 1995)	24, 25
<u>United States v. Estrada-Plata</u> , 57 F.3d 757 (9th Cir. 1995)	20
<u>United States v. Fares</u> , 978 F.2d 52 (2d Cir. 1992)	25
<u>United States v. Gomez-Lopez</u> , 62 F.3d 304 (9th Cir. 1995)	21
<u>United States v. Greenwood</u> , 796 F.2d 49 (4th Cir. 1986)	26
<u>United States v. Heidecke</u> , 900 F.2d 1155 (7th Cir. 1990)	22
<u>United States v. Henry</u> , No. 94-628-CBM (C.D. Cal. June 26, 1995)	19
<u>United States v. Marshall</u> , 56 F.3d 1210 (9th Cir. 1995)	11, 19, 20, 27
<u>United States v. Penagaricano-Soler</u> , 911 F.2d 833 (1st Cir. 1990)	8
<u>United States v. Parham</u> , 16 F.3d 844 (8th Cir. 1994)	8, 27
<u>United States v. Peete</u> , 919 F.2d 1168 (6th Cir. 1990)	26
<u>United States v. Redondo-Lemos</u> , 955 F.2d 1296 (9th Cir. 1992)	6
<u>United States v. Nolan Reese</u> , No. 94-5026 (9th Cir. July 26, 1995)	19
<u>United States v. Schmucker</u> , 815 F.2d 413 (6th Cir. 1987)	26, 27
<u>United States v. Wayte</u> , 710 F.2d 1385 (9th Cir.), aff'd, 470 U.S. 598 (1985)	20

Rules, Regulations and Statutes

8 U.S.C. § 1326	21
8 U.S.C. § 1326(a)	25
18 U.S.C. § 924(c)	3

18 U.S.C. § 3006A(b) 1

21 U.S.C. § 841 4, 5

21 U.S.C. § 841(a)(1) 3, 4

21 U.S.C. § 846 3, 5

Rule 10.1 Supreme Court Rules 12

Rule 10.1(c), Supreme Court Rules 15, 17

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Shelton Auntwan Martin hereby opposes the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed by the Solicitor General in this case.

I.

OPINIONS BELOW

The en banc opinion of the court of appeals is reported at 48 F.3d 1508. The panel opinion of the court of appeals is reported at 21 F.3d 1431. No written opinion was issued by the district court.

. . .

II.

JURISDICTION

The judgment by the Ninth Circuit court of appeals en banc was entered March 2, 1995. The petition for a writ of certiorari was filed by the Solicitor General, after extension, on July 27, 1995. It was received by respondent on July 31, 1995. By letter dated August 21, 1995, respondent was granted an extension of time within which to file an opposition to and including September 29, 1995.

III.

STATEMENT OF THE CASE

In March of 1995, the Ninth Circuit court of appeals en banc found that respondents "established several specific facts, not mere allegations, which establish a colorable basis to believe that the government has engaged in selective prosecution." (App.¹ at 26a, citing United States v. Bourgeois, 964 F.2d 935, 939 (9th Cir. 1992).) The court of appeals did not find that respondents had conclusively proven the existence of either a discriminatory motive or a discriminatory effect. Rather, the court of appeals found that the evidence submitted to the district court was sufficient to provide a colorable basis for believing both the motive and effect might be present and, thus, it was within

¹"App." shall refer to the Appendix to the Petition for a Writ of Certiorari filed in this case.

the district court's discretion to order the four items of discovery requested by respondent.

The court recognized the seriousness of respondents' claim and found, "[d]iscovery is the crucial means by which defendants may provide a trial judge with the information needed in order to determine whether a claim of selective prosecution is meritorious." (App. at 27a.) The court of appeals found that a district court's responsible concern and discretionary order for a limited inquiry should be applauded and that such an order could not be viewed as an abuse of discretion. (App. at 27a.)

In this case, five young African-American males were charged with violations of federal law in 1992. The indictments alleged violations of 21 U.S.C. § 846, conspiracy to distribute cocaine base; 21 U.S.C. § 841(a)(1), sale of cocaine base; and 18 U.S.C. § 924(c), use of a firearm in connection with a drug offense. The case was investigated by a joint task force consisting of Inglewood Police Department narcotic officers and members of the Bureau of Alcohol Tobacco and Firearms. (App. at 4a.)

The ramifications of the decision to prosecute the case in federal court, rather than in California state court, were severe. The sentencing exposure for respondents rose from 3-5 years in state prison to a mandatory minimum of 10 years and a maximum of life imprisonment in federal prison for the charges under 21 U.S.C. § 841(a)(1) alone. (App. at 4a, 69a-69b.)

Respondent Martin sought information regarding this decision by filing a motion for discovery and/or dismissal

based on selective prosecution. Martin claimed the decision to prosecute him federally was based on his race and he sought information to support his claim. All defendants joined in the motion. (App. at 4a.)

In support of the motion, Martin introduced a survey of all cases charging violations of 21 U.S.C. §§ 841, 846 that were closed in 1991 by the Federal Public Defender's Office for the Central District of California. All defendants in those cases were African-American. (App. at 5a.)

The district court found this evidence sufficient to support a limited order for discovery, and ordered the United States Attorney's Office to produce: (1) a list of all cases in the previous three years where the prosecutors charged both cocaine base violations and firearms offenses; (2) the race of the defendants in those cases; (3) whether the cases were prosecuted by state or federal authorities or joint task forces, and (4) the criteria used by the prosecutors for determining whether to bring a cocaine base case to federal court or refer it for state prosecution. (App. at 5a.)

Rather than comply with the order, prosecutors moved for reconsideration and submitted information showing that they had also prosecuted members of other racial or ethnic minority groups during the prior three years, and that some of those were represented by the Federal Public Defender. They were not cases closed by that office during 1991 but, rather, cases that fell outside the survey period. (App. at 5a-5b, 20a.) The prosecutors also submitted a list of 2400 defendants charged with violations of 21 U.S.C. § 841 (generally,

manufacture or distribution of controlled substances) and 1700 charged with violations of 21 U.S.C. § 846 (attempt or conspiracy to commit an offense under the Drug Abuse Prevention and Control Act) during the prior three-year period. They refused to identify the defendants charged with violations involving cocaine base or to identify the race of any of the defendants. (App. at 5a, 33a.)

Respondents then submitted additional evidence by way of declarations showing that potential similarly situated white defendants did exist. (App. at 6a.) The district court affirmed its earlier order of discovery, finding, "[t]he statistical data provided by the Defendant raises a question about the motivation of the Government which could be satisfied by the government disclosing its criteria, if there is any criteria, for bringing this case and others like it in Federal Court. Without this criteria the statistical data is evidence and does suggest that the decisions to prosecute in Federal Court could be motivated by race. Without expert testimony, this Court cannot conclude that the defendants' evidence is explained by social phenomena." (App. at 7a.)

The district court held further that, "[t]he court sees it different than Bourgeois, in that in this case we do have something more than mere allegations." The district court noted that at issue is "a fairly general charge -- one that we see regularly in this courthouse -- and whether it is coincidental or not, that out of the group that the public defender [proffered] all of them happen to be of the same racial group." (App. at 77a.) The district court concluded,

"the number [of black defendants shown by the public defender] is adequate that [it] would at least require the government to provide some explanation. The time period is such that would require some explanation. The charges are the same or similar, and the race is the same in each case." (App. at 78a.)

The government again chose not to comply with the order to produce the four items and the district court dismissed the indictments as a sanction for non-compliance. (Id.)

On appeal, a three-judge panel of the Ninth Circuit reversed, with one judge dissenting. The court of appeals attempted to resolve a perceived conflict within the Circuit between United States v. Redondo-Lemos, 955 F.2d 1296 (9th Cir. 1992), and United States v. Bourgeois, 964 F.2d 935 (9th Cir. 1992). The majority adopted the Bourgeois "colorable basis" standard for discovery, but found that respondents' evidence did not furnish a colorable basis for believing that similarly situated white defendants had not been prosecuted and that, consequently, the evidence did not meet the legal threshold for an order of discovery. (App. at 79a-83a.)

The dissent argued that the majority had "abruptly [cut] off exploration of the explosive charge made by these two [sic] defendants, concluding, surprisingly, that Judge Marshall abused her discretion in ordering further discovery." (App. at 85a.)

The dissent criticized the distinctions set forth by the majority among three categories of cases. (Id. at 87a-90a.) It also supported adoption of the Bourgeois standard, noting

that despite the "high threshold" showing required, "under that test a defendant need not come anywhere close to proving a claim of selective prosecution in order to obtain discovery." (App. at 91a.) Thus, both the majority and the dissent agreed that the "colorable basis" standard was an appropriate standard for discovery -- they disagreed on the factual showing necessary to meet it.

The dissent found further that:

[w]hen a defendant presents statistics tending to show that all prosecutions over a significant period of time are directed at member of a single race, such a presentation alone should raise sufficient suspicion to warrant a further inquiry. On closer scrutiny, we may discover that the statistics can be explained by methodological defects ... However, one fact we most assuredly will never find. If our method of analysis is at all fair or rational, we will not discover that it is only members of the defendant's race who commit the crime in question.

(App. at 95a-97a.)

The en banc court adopted the "colorable basis" standard set forth in Bourgeois, and clarified the standard in three ways. First, the court explained that the "high threshold" language in the opinion was erroneous as it appeared to have

"set an artificially onerous burden" on defendants. (Id. at 9a).

Second, the court emphasized that to succeed on a claim of selective prosecution, a defendant must show a discriminatory effect and purpose. (App. at 10a, citing Wayte v. United States, 470 U.S. 598, 608 (1985).) These requirements may be met using circumstantial evidence and circumstantial proof of intent which may include evidence of disproportionate impact. (Id. at 10a, citing Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977); Diaz v. San Jose Unified School District, 733 F.2d 660, 662 (9th Cir. 1984) (en banc), cert. denied, 471 U.S. 1065 (1985); Batson v. Kentucky, 476 U.S. 79, 93 (1986).) The court held that evidence of statistical disparity could support both the discriminatory purpose and disparate effect prongs of the standard for discovery. (Id. at 11a).

Finally, the court noted that district judges reviewing discovery requests should be mindful of the evidentiary obstacles faced by defendants on a claim of selective prosecution. (Id. at 11a.)

The court noted that the circuits generally follow the "colorable basis" requirement although the First, Second, Fifth and Eighth require a prima facie showing.² (Id. at

² Citing United States v. Penagaricano-Soler, 911 F.2d 833, 838 (1st Cir. 1990); St. German of Alaska Eastern Orthodox Catholic Church v. United States, 840 F.2d 1087, 1095 (2d Cir. 1988); United States v. Johnson, 577 F.2d 1304, 1308 (5th Cir. 1978); United States v. Parham, 16 F.3d 844, 847 (8th Cir. 1994). The court also discussed the "colorable basis" standard adopted by the Third, Sixth, Seventh, Tenth and D.C. Circuits, and the "non-frivolous" standard adopted by the Eleventh and Fourth Circuits.

12a.) Whatever the semantics utilized, all circuits agree that more than a frivolous showing of both purpose and effect is required to obtain discovery.

Chief Judge Wallace concurred, in agreement that Bourgeois set forth the acceptable standard for discovery although he did not agree that the colorable basis standard needed clarification. He felt the "high threshold" language was appropriate, given the dangers of intrusive review of charging decisions. (Id. at 29a.) He agreed that a defendant must provide "hard data about others similarly situated" to establish a prima facie case which, if unrebutted, would require dismissal. (Id. at 30a-31a.) Chief Judge Wallace noted that any discussion of the requirements for dismissal, and whether the statistics presented in this case would meet those requirements, is "all beside the point at the discovery stage, where only some evidence, tending to show selective prosecution, is required." (Id. at 31a.)

Chief Judge Wallace recognized the dangers of second-guessing the ruling of a district court in a discovery matter. (Id. at 29a.) He pointed out that, "'[a]bsent a definite and firm conviction that the district court committed a clear error of judgment, we will not disturb the district court's decision.'" (Id. at 30a, citing Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).) He reviewed the evidence presented to the district court in this case -- the survey of cases closed by the Federal Public Defender in 1991, the two affidavits and the newspaper article -- and pointed

out that the abuse of discretion standard afforded the district judge "flexibility." (Id. at 30a.)

In dissent, Judge Rymer, joined by Judges Leavy, T.G. Nelson and Kleinfeld, argued that the majority had "[collapsed] intent into effect by holding that both may be shown by the same insubstantial statistic." (Id. at 32a.)

The dissent found the majority opinion "crafts a new standard" rather than clarifying the colorable basis standard and that it allowed discovery on a showing that discrimination "may" have occurred, rather than a definitive showing it had occurred. (Id. at 44a.) The dissent would require a specific showing of a similarly situated non-black offender who was not prosecuted, rather than a colorable basis for believing such an individual exists. (Id. at 46a.)

The dissent did agree that, in limited circumstances, a pattern of prosecution of a single racial group could provide circumstantial evidence of intent. (Id. at 58a.) It disagreed that the statistical evidence presented to the district court here was sufficient to support the inference. (Id.)

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IV.

REASONS TO DENY THE PETITION.

A. THE ISSUE PRESENTED IS WHETHER THE NARROW DISCOVERY ORDER ISSUED BY THE DISTRICT COURT CONSTITUTED AN ABUSE OF DISCRETION.

i. The District Court Did Not Abuse Its Discretion And Applied The Appropriate Standard In Ordering Discovery.

This Court need look no further than the court of appeals' ruling in United States v. Marshall, 56 F.3d 1210 (9th Cir. 1995), to ascertain the unremarkable nature of the essence of the holding in this case. On a virtually identical record, the denial of discovery was upheld -- the true holding in this case is nothing more than a recitation of the truism that great deference is given to the district court's rulings on discovery.

Petitioner would have this Court believe that the court of appeals has significantly altered the standard required for dismissal of a case based on selective prosecution, when all it has done is explain the established standard to be met before discovery may issue. Petitioner confuses these two issues and dramatically inflates the court of appeals' holding. Should this Court grant review, it would be required to do one of two things: review the fact-specific exercise of discretion by a district judge under the deferential abuse of

discretion standard; or review the semantics employed by the circuit courts in selective prosecution discovery cases -- words like "high threshold," "colorable basis," "non-frivolous" and "prima facie." Regardless of the semantics, district judges would still be called upon to exercise discretion in determining whether the factual showing provided met the "standard." It is unlikely this Court's ruling would assist in that task. This Court has determined review is appropriate only "when there are special and important reasons therefor." (Rule 10.1, Supreme Court Rules.) No such reasons are present in this case.

Petitioner correctly advises this Court that selective prosecution claims are reviewed under "ordinary equal protection standards." (Petition at 11, citing Wayte v. United States, 470 U.S. 598, 608 (1985).) See also Washington v. Davis, 426 U.S. 229 (1976); Yick Wo v. Hopkins, 118 U.S. 356 (1886). However, its ensuing discussion is misleading. The standard set in Wayte for dismissal of all charges requires conclusive proof of discriminatory effect and of discriminatory purpose. Petitioner claims discriminatory effect, sufficient to allow a discretionary discovery order to stand, must be established by a specific showing that similarly situated defendants have not been prosecuted. (Petition at 11-12.) Wayte tells what is needed for ultimate victory on a selective prosecution claim. No case requires that a defendant offer conclusive proof of the ultimate issue to obtain discovery. Such a requirement would strain common sense.

Chief Judge Wallace recognized this fact in his concurrence to the en banc opinion when he stated, "[t]he language of the colorable basis standard does indicate that specific facts must exist to establish the basis for believing that 'discriminatory application of law' and 'discriminatory intent' are present. But without discovery, the contention that 'others similarly situated' have not been prosecuted (a claim essential to the prima facie case) may be impossible to show." (App. at 31a.)

Discovery is the first step a defendant can take toward proving a claim. To require more specific and conclusive proof than was offered in this case would signal the death of selective prosecution claims. This Court must see clearly that what is at issue is a mere discovery order, upheld under the abuse of discretion standard.

The Ninth Circuit court deferred appropriately to the district court's findings, noting "[w]e are mindful that it is only a discovery order that we are reviewing To order discovery, the district court need not decide that the defendants have in fact demonstrated the existence of selective prosecution. If such conclusive determinations could be made without discovery, there would be no need for discovery in the first place. Thus, the evidence necessary to obtain a discovery order when a charge of selective prosecution has been made is obviously substantially less than that needed to prove the charge itself." (App. at 8a.)

The district court, in line with direction given by this Court and the court of appeals, determined that the

established standard for issuance of a limited discovery order had been met. Such a ruling is not a fundamental change in the law, nor is it a radical departure from the task performed daily by district judges in every circuit. The reason we are here is simple -- petitioner believes no review should be allowed by the judiciary of its charging practices, and no access by the public should be permitted to information innocuous in and of itself, which might point to the frightening possibility of institutional racism in our law enforcement arena.

Although no new standard has been applied or articulated by any court in this case, petitioner claims the court of appeals' rulings "fundamentally change the legal principles that have governed selective prosecution claims until now." (App. at 11.) The narrow holding of the court of appeals at issue here is that the district court did not abuse its discretion when it ordered limited discovery, applying the

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colorable basis standard.³ This Court has previously held:

Whether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise. Had Congress merely committed the choice of remedy (for violation of the Speedy Trial Act) to the discretion of district courts, without specifying factors to be considered, a district court would be expected to consider "all relevant public and private interest factors," and to balance those factors reasonably. Appellate review of that determination necessarily would be limited, with the absence of legislatively identified standards or priorities.

United States v. Taylor, 487 U.S. 326, 336 (1988) (citation omitted).

In Taylor, it appeared that the court had so far departed from the accepted and usual course of judicial proceedings that review by this Court was appropriate.⁴ This case

³Petitioner claims that the court of appeals established a new standard for dismissal based on a selective prosecution claim. (Petition at 18.) However, the standard for dismissal was clearly set forth in Wayte. No dismissal for selective prosecution has occurred and, thus, this issue is at best premature. Additionally, petitioner's reliance on McClesky v. Kemp, 481 U.S. 279, 313 (1987), seems superfluous -- this case is not about the ultimate issue. (Petition at 18.) McClesky offers no guidance in a dispute over discovery.

⁴See Rule 10.1(c), Supreme Court Rules.

presents a situation where discretion is fact-specific. Such a case presenting a discretionary order for discovery requires one conclusion -- appellate review is appropriately limited and deference is given appropriately to the district court.

- ii. The Court Of Appeals Did Not Hold That The Evidence Proffered In Support Of The Discovery Request Would Meet The Standard For Dismissal.

Petitioner offers an analogy to Wade v. United States, 504 U.S. 181 (1992), to support its argument that a substantial showing should be required before a discovery order may issue questioning government motives. (Petition at 14). Petitioner argues further that the court of appeals has "dispens[ed] with an essential element of a claim selective prosecution" because it did not require specific evidence of similarly situated non-prosecuted defendants, but rather found only that a colorable basis for believing such defendants exist would suffice. (Petition at 15.) This is not accurate -- the court of appeals merely interpreted the evidence presented in a common sense fashion and found it did meet the standard for discovery, albeit not yet for dismissal.

Statistical studies can provide evidence of both intent and effect. This court has noted, "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266

(1977). See also Gomillion v. Lightfoot, 364 U.S. 339 (1960); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Washington v. Davis, 426 U.S. 229 (1976).

It is petitioner that tries to meld into one both the standard applicable to a motion to dismiss and the standard applicable to a motion for discovery --- this is discovery, not dismissal. The court of appeals recognized the difference, as will this Court.

- iii. This Case Does Not Present An Important Question Of Federal Law And It Has Not Had A Major Impact On The Administration Of Justice.

Rule 10.1(c) of the Supreme Court Rules indicates that this Court will consider review when a, "United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court." Petitioner seems to claim that the district court's order that the government provide limited discovery without a concrete showing of a similarly situated non-minority who was not prosecuted is such an important question which, "threaten[s] to have a substantial impact on the prompt and effective enforcement of the criminal law." (Petition at 11.) This prediction is both hyperbolic and speculative and has been proven incorrect by cases following the ruling in the Ninth

Circuit.⁵ The United States Attorney recently responded to

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⁵Petitioner's listing of cases remanded after the ruling of the court of appeals reflects motions that were filed before the court of appeals' ruling in this case. They are merely indicative of the result of any clarification of a standard. (Petition at 24-25 at n.4.) Cases must be considered under the articulated standard -- such would be the same result had this Court issued a new ruling clarifying or adopting a standard. On remand, few of these motions have even been granted.

In addition, petitioner's stated concern for potential discovery disputes involving white defendants or based on gender seems disingenuous. (Petition at 25-26.) One need only review the dissenting opinion by Justice Marshall in Regents of Univ. of California v. Bakke, 438 U.S. 265, 387-401 (1978), to be reminded of the prejudices that have plagued black Americans -- the disparity of the crack cocaine sentencing structure seems but the latest injustice visited upon this segment of our citizenry. White LSD or antitrust defendants would hardly have the same argument -- nor are they subjected to the harsh sentencing scheme that would apply to respondents.

one motion which has, thus far, been the end of the effort required.⁶ The problem is not that their response required a massive effort. It did not.

The problem is that the United States Attorney's Office in the Central District of California was simply loathe to comply with any order. In the face of the national problem which has impacted our African-American communities, such a stand was simply arrogant. Its compliance with later requests indicates even it recognized the inappropriateness of its stand. In fact, petitioner has gone so far as to label "intrusive" the concern of the judiciary for the freedom of our citizens from discriminatory prosecution practices.

(Petition at 22.)

⁶In United States v. Henry, No. 94-628-CBM (C.D. Cal. June 26, 1995), the prosecutors opposed a motion for discovery re: selective prosecution filed by defendants charged with violations of the cocaine base statute. The prosecutors filed an extensive opposition, including many declarations. The motion was then denied by Judge Marshall, the same district judge who ruled on the motion that is the subject of petitioner's request. That same opposition continues to be filed by the prosecutors, and the motions continue to be denied. (See Petition at 22a-23a.) (See "Judge Rejects Claims of Bias in Crack Case," Los Angeles Times, A3-A11 (June 27, 1995).) A similar motion was denied in United States v. Marshall, 56 F.3d 1210 (9th Cir. 1995), and that denial was upheld. In United States v. Nolan Reese, No. 94-5026 (9th Cir. July 26, 1995), the district court denied a discovery motion and that case was remanded for reconsideration in light of the court of appeals holding in this case. The court expressly cautioned that it was not advocating a reversal of the district court's earlier ruling and was not advising the court on how to exercise its discretion. It seems clear, then, that had the prosecutors responded thus to the motion filed in this case, that motion might also have been denied.

One must conclude the prosecutors simply realized they were wrong to defy the court's earlier legitimate order and cured their error in the Henry case. One must also conclude that their work is over and no perceptible impediment to the law enforcement effort has occurred.

Recently, the Ninth Circuit has had occasion to apply the colorable basis standard articulated in this case. In United States v. Marshall, 56 F.3d 1210 (9th Cir. 1995), the defendant submitted the same survey as respondents proffered in this case, along with one newspaper article, in support of a motion for discovery regarding selective prosecution. Marshall appeared to be a large-scale drug dealer, arrested and charged with over 5 kilos of crack cocaine in his apartment, along with over 1 kilo of powder cocaine. (Id. at 1211.) The court of appeals upheld the denial of discovery, finding that Marshall had not provided evidence that the defendants in the Federal Public Defender's survey were similarly situated large-scale dealers. (Id. at 1212.) The court of appeals found no abuse of discretion in the district judge's refusal to order discovery.

Similarly, in United States v. Estrada-Plata, 57 F.3d 757 (9th Cir. 1995), the court of appeals applied the en banc court's ruling in this case to three different selective prosecution claims, finding no abuse of discretion in the district court's denial of each. (Id. at 760-761). The court specifically noted that the ruling in this case did not "change [the] longstanding rule" established in United States v. Wayte, 710 F.2d 1385, 1387 (9th Cir.), aff'd, 470 U.S. 598 (1985), that a prima facie showing of invidious discrimination requires proof of similarly-situated non-prosecuted individuals and proof of discriminatory intent. (Id. at 760 and n.1.) The court also pointed out that review of the

factual determinations supporting those factors would be for clear error. (Id. at 760.)

Finally, in United States v. Gomez-Lopez, 62 F.3d 304 (9th Cir. 1995), the court of appeals reviewed an order for circuit-wide discovery in a selective prosecution challenge to prosecutions under 8 U.S.C. § 1326. It applied the en banc ruling in this case and reversed the district judge, finding that the order for circuit-wide discovery was an abuse of discretion where no evidence was presented that any "decision-making [regarding prosecution] occurred at the circuit level." (Id. at 305.)

This is hardly a revolutionary ruling. Instead, the ruling in this case has been and is being narrowly and reasonably applied.

B. THE COURT OF APPEALS RULING HAS NOT CREATED A CONFLICT AMONG THE CIRCUITS -- ALL CIRCUITS AGREE THAT A DEFENDANT MUST PROVIDE EVIDENCE OF SIMILARLY SITUATED NON-PROSECUTED INDIVIDUALS TO OBTAIN DISCOVERY ON A CLAIM OF SELECTIVE PROSECUTION.

Petitioner claims review is appropriate because the opinion of the court of appeals "conflicts with decisions from numerous courts of appeal that have required defendants to make a threshold showing that similarly situated persons have not been prosecuted before discovery may be ordered" (Petition at 11, 19.) However, it then appears to concede there is no conflict in the standard and that "the circuits

that have squarely addressed the issue have all held that, before obtaining discovery, a defendant must make a threshold showing that other similarly situated have not been prosecuted." (Id. at 19.)

The court of appeals has not abandoned the principle set forth in Bourgeois, as petitioner suggests. (Petition at 21.) Rather, the court held that the colorable basis requirement was met. (Petition at 4a). It has merely ruled that the district court's determination that the standard was met was not an abuse of discretion. Surely such a finding deserves this Court's deference as well.

The court of appeals affirmed the standard articulated in Bourgeois and clarified its meaning. The court noted that the standard could be met by " 'some evidence tending to show the essential elements of the claim.' " (App. at 8a, citing United States v. Heidecke, 900 F.2d 1155, 1159 (7th Cir. 1990).) -More than a frivolous showing or conclusory allegation must be advanced by a defendant. (Id. at 8a.) Thus, the court did not hold that mere suspicions or allegations by a defendant would suffice --- it merely held that the threshold showing required should not be so high as to place an "artificially onerous burden" on a defendant. (Id. at 9a.) This Court has held in Batson v. Kentucky, 476 U.S. 79, 93-97 (1986), that a pattern of behavior may provide an "inference of purposeful discrimination." Such a pattern would necessarily provide more than a suspicion or mere allegation.

In fact, the court of appeals, like all other circuits, and following the dictates of Wayte, held that ultimate success on a claim of selective prosecution can only be achieved upon a conclusive showing of discriminatory effect and purpose. (See App. at 9a-10a.) The specifics of the proof required for discovery is what is at issue here -- a matter traditionally left to the judgment and discretion of district judges.

The evidence submitted to the district court in this case provided a colorable basis to believe others similarly situated had not been prosecuted. The district judge retained the discretion to determine that the explanation provided by prosecutors was simply not enough to cause reconsideration of her ruling. As the dissent to the panel opinion here stated, "[g]iven the prevalence of all kinds of drugs throughout our community, at least some crack distributors must be non-blacks." (App. at 95a.) Prosecutors have never disputed this fact nor have they claimed that no similarly situated white offenders exist.

The court of appeals explained, as this Court has long recognized, that in the extreme case, evidence of invidious purpose or intent may include circumstantial evidence, including evidence of impact. (App. at 10a, citing Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977); Diaz v. San Jose Unified School District, 733 F.2d 660, 662 (9th Cir. 1984) (en banc), cert. denied, 471 U.S. 1065 (1985); see also Batson v. Kentucky, 476 U.S. 79 (1986).)

The court of appeals noted that its adoption of the Bourgeois colorable basis standard rendered the law of the circuit more in line with other circuits. (App. at 13a-14a.) The court deliberately declined to adopt a less frivolous standard in recognition of the dangers of overly intrusive judicial review of prosecutorial decision-making. (Id. at 14a.)

Petitioner relies on Attorney General v. Irish People, Inc., 684 F.2d 928, 947 (D.C. Cir. 1982), cert. denied, 459 U.S. 1172 (1983), to remind the Court that the government enjoys a presumption of having acted in good faith and in a nondiscriminatory manner when prosecuting cases, and that a colorable showing of similarly situated individuals is necessary for discovery. (Petition at 16, 19.) Irish People was, in fact, a civil case where a defendant claimed it was singled out for prosecution because of its editorial policy. No statistics were offered and no facts supported the defense suspicion. The court stated, "[b]ecause we conclude that the findings of the district court demonstrate not even a colorable showing of selective prosecution, reversal is proper whether or not the showing which a defendant must make to obtain discovery differs from the showing it must make at trial to establish a prima facie case of selective prosecution . . . we find further at this time that defendant in fact need make only a colorable showing of each prong of the defense in order to be entitled to discovery." (Id. at 932 n.8.)

In United States v. Cooks, 52 F.3d 101 (5th Cir. 1995), the Fifth Circuit upheld the denial of a defense motion for

discovery relating to selective prosecution. Cooks presented evidence of a national report noting a large increase in drug arrests in recent years and he noted the existence of statistics showing the "overwhelming majority" of those arrested for possession of cocaine base are minorities.⁷ Cooks did not offer evidence of "discriminatory animus." Cooks did not carry the "heavy burden" of proving selective prosecution, nor did the court find he had established a "colorable claim," sufficient to allow discovery. (Id. at 105.) However, the 5th Circuit clearly held the "heavy" burden referred to dismissals, not discovery.

The Second Circuit held in United States v. Fares, 978 F.2d 52, 59 (2d Cir. 1992), that, "[t]o warrant discovery with respect to a claim of selective prosecution, a defendant must present at least 'some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements.' Mere assertions and generalized proffers on information and belief are insufficient." (Citations omitted.) The court found no abuse of discretion where the district court denied discovery based on Fares' assertion he was prosecuted for illegal re-entry because of the government's claim he was a member of Hizbellah in a district that rarely prosecuted violations of 8 U.S.C.

⁷From arrest statistics one could, at most, infer selective enforcement by the police. Here, the district court was presented with statistics regarding federal prosecutions, not arrests. Thus, this case is distinguishable from Cooks.

§ 1326(a) violations. (Id. at 58.) The government had countered his claim by showing 13 other prosecutions had occurred in that district, and Fares did not rebut that showing with large numbers of similarly situated non-prosecuted individuals. (Id. at 60.) Fares provided no evidence, but only mere allegations which all circuits reject as a proper showing required for discovery.

The Fourth Circuit held in United States v. Greenwood, 796 F.2d 49, 52 (4th Cir. 1986), that a nonfrivolous showing of both effect and purpose were required to entitle a defendant to discovery. A reversal of the district court's finding that a claim does not meet the standard is reviewed for abuse of discretion. Greenwood's claim of racial animus and personal vindictiveness on the part of his supervisor had been denied by affidavit and had no factual support independent of Greenwood's own statements. (Id. at 52.) Thus, the denial of discovery was upheld, the court finding that his request was frivolous, a mere "fishing expedition." (Id. at 53.)

In United States v. Peete, 919 F.2d 1168 (6th Cir. 1990), the Sixth Circuit reviewed a selective prosecution claim in the context of a Hobbs Act prosecution. The court relied on United States v. Schmucker, 815 F.2d 413 (6th Cir. 1987), and affirmed the standard for discovery established therein. In Schmucker, the court held that, " '[a] defendant may . . . be entitled to discovery on the issue of selective prosecution if he introduces some evidence tending to show the existence of the essential elements of the defense.' " 919 F.2d at 1176,

citing Schmucker at 418. Peete proffered only his own "self-serving affidavit" and that of his counsel to indicate others similarly situated had not been prosecuted. (Id.)

In United States v. Parham, 16 F.3d 844, 847 (8th Cir. 1994), the defendants were charged with Voting Rights Act violations. In support of their motion for discovery regarding a claim of selective prosecution, they proffered only affidavits indicating harassment and intimidation of black voters. (Id. at 846 n.3.) The court held that the defendants must establish a prima facie case of selective prosecution, including a showing that others similarly situated had not been prosecuted and that an impermissible motive was behind the failure to prosecute. The court of appeals upheld the findings of the district court that the showing was inadequate. (Id. at 846-47.) The Eighth Circuit ruled that the defendants must show that a similarly situated individual was not prosecuted in order to meet the threshold requirement. (Id. at 847.) No statistical evidence was presented and, like the other cases cited by petitioner, this case confirms that the district court's findings on a motion for discovery will rarely be disturbed.⁸

Thus, all cases cited by petitioner fail to offer support for the prosecutor's decision to refuse the discovery order.

⁸All cases cited by petitioner reflect fact-specific findings by district courts that are not disturbed on appeal, reflecting the deference given to district courts in the discovery arena. In fact, the court of appeals in United States v. Marshall, 56 F.3d 1210 (9th Cir. 1995), noted it would not have disturbed the district court's ruling either way on the facts presented.

(Petition at 19-20.) Nor do they show that the district court abused its discretion in ordering discovery. Contrary to petitioner's claim, the decision in this case has not "created" a conflict in the circuits. (Petition at 21.)

V.

CONCLUSION

Respondents offered a legitimate inquiry into the charging decisions that led to their prosecution in federal court, and concomitant exposure to sentences ranging from 35 years to life without parole for offenses that are far less serious than many that occur in their community. Their inquiry deserves the respect of the government, not the belittling and invalidating suggestion that this request was made for the purpose of delay. (See Petition at 13-14.) Such a response is shocking given the concern in our nation and, in particular among our judiciary, for the plight of the young African-American male charged in federal court. (See App. at 40a and n.4, noting the "legitimate and widespread" concern for the impact of mandatory minimum sentences, particularly with regard to cocaine base offenses, on young black males and referencing the findings of the United States Sentencing Commission that 87.9% of all those convicted in federal court for cocaine base violations are African-American.)

This Court is asked to consider whether a district judge abused her discretion by ordering prosecutors to provide limited information on their prior charging decisions, when

the defense provided evidence that those practices may have been discriminatory. A response to Judge Marshall's order would have sufficed. This is simple arrogance which should not be tolerated by this Court. No review by this Court is appropriate and no writ of certiorari should issue.

For the foregoing reasons, Shelton Auntwan Martin respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Federal Public Defender

DATED: September 28, 1995

Barbara O'Connor
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Deputy Federal Public Defender
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ORIGINAL

No. 95-157

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

UNITED STATES OF AMERICA, PETITIONER

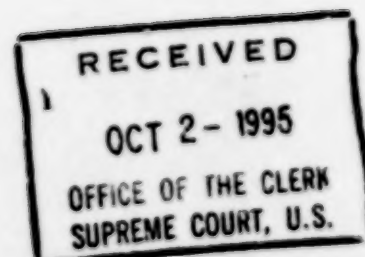
vs.

CHRISTOPHER LEE ARMSTRONG, ET. AL., RESPONDENTS

CERTIFICATE OF SERVICE

I, Barbara E. O'Connor, hereby certify that on this 28th
day of September, 1995, a copy of Motion for Leave to Proceed
in Forma Pauperis, Affidavit and Opposition to Petition for
Writ of Certiorari to the United States Court of Appeals for
the Ninth Circuit were mailed postage prepaid, to the
Solicitor General of the United States, Department of Justice,

* * *



* * *

Washington, D.C. 20530, counsel for the Petitioner, along
with all counsel as listed on the attached service list.

Respectfully Submitted,

DATED: September 28, 1995

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OCT 16 1995

No. 95-157

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER*v.***CHRISTOPHER LEE ARMSTRONG, ET AL.**

***ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT***

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1995

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UNITED STATES OF AMERICA, PETITIONER

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CHRISTOPHER LEE ARMSTRONG, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
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REPLY BRIEF FOR THE UNITED STATES

1. Respondents contend that the Ninth Circuit's en banc holding amounts to "nothing more than a recitation of the truism that great deference is given to the district court's rulings on discovery." Martin Br. in Opp. 11; see Rozelle Br. in Opp. 5-8; Hampton Br. in Opp. 8, 16. The court of appeals did far more, however, than reaffirm that district court discovery orders are reviewed for an abuse of discretion. Rather, the court reformulated the legal standards that govern a district court's exercise of discretion in granting discovery on claims of selective prosecution, and in doing so significantly departed from the established law in this area.

The court of appeals squarely held that a district court may order discovery on a claim of selective prosecution based solely on evidence that persons of a particular race have been prosecuted, without any evidence that similarly situated persons of a different race have not been prosecuted. Pet. App. 18a-19a & n.6. The court specifically stated that "no 'comparison pool' is necessary when the record contains statistical evidence tending to show that only members of racial or ethnic minority groups have been prosecuted." *Id.* at 19a n.6. Our petition seeks review of that unprecedented legal ruling.

Contrary to respondents' view, the importance of that issue is not diminished by the fact that district courts generally have considerable discretion to issue discovery orders. "[D]iscretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975), quoting *United States v. Burr*, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,692d) (Marshall, C.J.). Indeed, as respondent Martin acknowledges, "[w]hether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise." Br. in Opp. 15, quoting *United States v. Taylor*, 487 U.S. 326, 336 (1988). It is especially important that those legal principles be clear in the discovery context because the absence of standards permits the entry of highly intrusive orders that delay prosecutions.

2. Respondents contend that the court of appeals' ruling correctly recognizes that defendants should not have to prove their claim in order to obtain discovery. Martin Br. in Opp. 16-17; Hampton Br.

in Opp. 10, 14. In challenging the court of appeals' ruling, however, we do not argue that criminal defendants must conclusively prove that others similarly situated have not been prosecuted in order to obtain discovery. Rather, we argue (Pet. 14) that criminal defendants must make a substantial threshold showing on each element of a selective prosecution claim. That showing need not be of the same force as would be required to establish a *prima facie* case, but it must at a minimum address each element of the claim. The court of appeals has dispensed with the requirement of such a threshold showing on each element by adopting a novel legal presumption that the government's prosecution of members of one race means that it has failed to prosecute similarly situated members of a different race, unless the government introduces compelling evidence to the contrary. Pet. App. 18a-19a & n.6.

3. As we explain in our petition (Pet. 19-21), the court of appeals' decision in this case conflicts with decisions from numerous circuits that have held that discovery on a claim of selective prosecution may not be ordered absent a threshold showing that similarly situated persons have not been prosecuted. Respondents assert that there is no such conflict. Martin Br. in Opp. 21-28; Rozelle Br. in Opp. 7. According to respondent Martin (Br. in Opp. 23), the court's decision is consistent with that of other circuits because the court in this case found a colorable basis for believing that similarly situated persons had not been prosecuted. As we have explained, however, the court in this case in fact eliminated the requirement that defendants must make a threshold showing that others similarly situated have not been prosecuted in order to obtain

discovery, and relied on a presumption that such persons exist. No other circuit has dispensed with the required showing of a disparity in a discovery case, as did the court in this case.¹

Respondent Martin contends (Br. in Opp. 24-27) that the decisions from the other circuits upon which we rely are distinguishable either because the defendants in those cases introduced even less evidence than respondents did or because the court of appeals was affirming a district court's exercise of discretion. The key point, however, which Martin does not address, is that all of those decisions squarely held that discovery on a claim of selective prosecution may not be ordered absent concrete evidence that similarly situated persons of a different race have not been prosecuted. See Pet. 19-20. The court of appeals in this case is the first to dispense with that requirement.

4. Finally, respondents argue (Martin Br. in Opp. 17-21; Rozelle Br. in Opp. 17 n.6; Hampton Br. in Opp. 12) that the decision below has no significant impact.

¹ Contrary to respondent Hampton's contention (Br. in Opp. 9), the court of appeals did not base its legal ruling on the affidavits submitted by defense counsel, which, respondent asserts, show that numerous whites have been prosecuted in state court for crack offenses. While the court referred to those affidavits, it held that the evidence that the government had prosecuted members of a particular race was itself sufficient to trigger a discovery obligation. Pet. App. 17a. The court's limited discussion of the defense counsel affidavits is understandable. The district court did not rely on them to exercise its discretion. C.A. E.R. 184. The affidavits consist of vague and conclusory hearsay. And they do not contain any evidence that the white defendants prosecuted in state court for crack offenses are in any way similarly situated to those who have been prosecuted in federal court.

But the burden to respond to discovery motions under the court of appeals' extraordinarily lenient legal standard is significant, as is the potential for intrusion on prosecutorial discretion (Pet. 13). As we explain in our petition, numerous motions have been filed in the wake of the court's decision, and many more can be expected in the future. Pet. 22-25.²

* * * * *

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

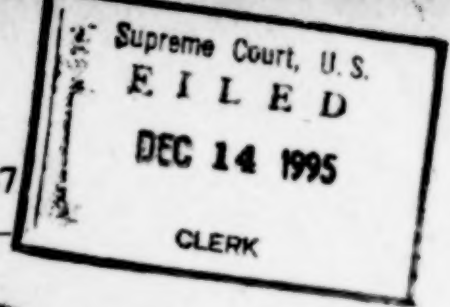
Respectfully submitted.

DREW S. DAYS, III
Solicitor General

OCTOBER 1995

² Contrary to respondent Martin's contention (Br. in Opp. 18-19 & n.6), the government's successful defense against a discovery motion in *United States v. Henry*, No. CR 94-628-CBM (C.D. Cal. June 26, 1995), does not show that the court's decision in this case has a limited impact. Nothing in the *Henry* decision precludes district court judges from ordering discovery in other cases. In fact, based on a showing similar to the one made in this case, one district court judge has just ordered discovery on a claim of selective prosecution. *United States v. Turner*, No. CR 94-649 (C.D. Cal. Oct. 12, 1995). Martin also relies (Br. in Opp. 11, 19 n.6) on *United States v. Marshall*, 56 F.3d 1210 (9th Cir. 1995), where the court of appeals affirmed a district court's refusal to order discovery. But nothing in that decision purports to disturb the holding in this case that district courts have broad discretion to order discovery on a claim of selective prosecution, without any evidence on an essential element of that claim.

(4)
No. 95-157



IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER LEE ARMSTRONG, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

JOINT APPENDIX

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EDITOR'S NOTE

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JOINT APPENDIX

TABLE OF CONTENTS

	<i>Page</i>
1. Relevant docket entries in the district court ..	1
2. Relevant docket entries in the court of appeals	28
3. Indictment, filed April 21, 1992	60
4. Defendants' Declaration of Marla Beller and Attached Exhibit, filed July 20, 1992	68
5. Government Declarations and Exhibits In Sup- port of Government's Motion for Reconsidera- tion, filed September 16, 1992	71
Declaration of Ralph Lochridge	71
Declaration of Mark Campbell	75
Declaration of Jeffrey Cochran	78
Declaration of David C. Scheper	80
Declaration of Lawrence H. Cho	82
Drug Enforcement Administration (DEA) Crack Cocaine Report	84
<i>United States v. Pratt</i> Transcript	118
<i>United States v. Jordan</i> Order	122
Government Narcotics Prosecution Statistics (11 page sample from original, numbering over 100 pages)	126
Defendant's Declaration of Barbara O'Connor In Opposition to Government's Motion for Reconsideration	138
Defendant's Declaration of David Reed In Support of Joinder in Selective Enforcement Discovery Motion	139
Partial Transcript of Proceedings, September 8, 1992	143
Transcript of Proceedings, December 4, 1992	165

	<i>Page</i>
<i>Los Angeles Times</i> Article, Nov. 23, 1992, lodged with district court December 4, 1992	208
Minute Order of District Court Denying Govern- ment's Motion for Reconsideration, December 29, 1992	211
Minute Orders of District Court Granting De- fendants' Motions to Dismiss Indictment, January 5 and 19, 1993	212
Transcript of Proceedings, January 5, 1993 ...	214
Government's Notice of Appeal, Case No. 92-50031, January 6, 1993	235
Government's Notice of Appeal, Case No. 92-50057, January 20, 1993	236
Order Allowing Certiorari, October 30, 1995 ...	237

U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA (LOS ANGELES)

CRIMINAL DOCKET FOR CASE
No. 92-CR-336-ALL

USA

v.

ARMSTRONG, ET AL.

ASSIGNED TO: JUDGE CONSUELO B. MARSHALL
DKT No. is 2:92-m-00693

Christopher Lee Armstrong
aka
Chris Armstrong, *defendant*

Filed: 4/21/92

Appeal

- 1/6/92 152 Fld request for crt to review prev fld applic for review of ord setting conds of rel fld by Juliet Ireland dtd 9/3/92 in prep for 1/8/93 bail hrg as to Christopher Lee Armstrong (mc) [Entry date 01/08/93]
- 4/3/92 1 COMPLAINT Christopher Lee Armstrong (1) count(s) cmp Magistrate Judge Elgin C. Edwards [2:92-m-693] (cshl) [Entry date 04/09/92]
- 4/3/92 — BENCH WARRANT issued for Christopher Lee Armstrong by Magistrate Judge Elgin C. Edwards [2:92-m-693] (cshl) [Entry date 04/09/92]
- 4/3/92 1 COMPLAINT Aaron Hampton (3) count(s) cmp Magistrate Judge Elgin C. Edwards [2:92-m-693] (cshl) [Entry date 04/10/92]
- 4/3/92 — BENCH WARRANT issued for Aaron Hampton by Magistrate Judge Elgin C. Edwards [2:92-m-693] (cshl) [Entry date 04/10/92]
- 4/3/92 1 Fld COMPLAINT Robert Rozelle (2) count(s) cmp Magistrate Judge Elgin C. Edwards [2:92-m-693] (bh) [Entry date 04/23/92]
- 4/3/92 — BENCH WARRANT issued for Robert Rozelle by Magistrate Judge Elgin C. Edwards [2:92-m-693] (bh) [Entry date 04/23/92]
- 4/3/92 1 Fld COMPLAINT Shelton Auntwan Martin (4) count(s) cmp Magistrate Judge Elgin C. Edwards [2:92-m-693] (bh) [Entry date 04/23/92]

- 4/3/92 — BENCH WARRANT issued for Shelton Auntwan Martin by Magistrate Judge Elgin C. Edwards [2:92-m-693] (bh) [Entry date 04/23/92]
- 4/8/92 2 Fld Report commencing criminal action dft as to Christopher Lee Armstrong arrested on 4/8/92 [2:92-m-693] (cshl) [Entry date 04/09/92]
- 4/8/92 3 MINUTES: first appearance of Christopher Lee Armstrong on cmplt, dft arrn, states t/n as Christopher Lee Armstrong, Attorney Guy Iverson, appted, dfpd, present; bail set at: \$250,000 ab w/cash dep of \$4,000, w/affd of surety no just of \$50,000 by dfts mother, w/\$100,000 just affd of surety by uncle Beverly Green, \$150,000 by other sureties and w/deed of prop, psa int supv, bail subject to nebbia and waivable by govt, trav rest to CDC, alcohol/drug testing per psa, residence w/uncle Green, not possess firearms or be in the presence of anyone using firearms, avoid places of egress, not ill use or possess drugs or be in the presence of anyone ill using or possessing for Christopher Lee Armstrong, preliminary exam set for 4/22/92 at 4:30 pm, PIA set for 4/27/92 at 8:30 am, dft commtd to cust of usm C/R: tape no 45 and 46 by Magistrate Judge Carolyn Turchin [2:92-m-693] (cshl) [Entry date 04/09/92]
- 4/8/92 4 Fld notice dir dft to app for prelim hrg and for arrn on indict/info [2:92-m-693] (cshl) [Entry date 04/09/92]
- 4/8/92 5 Fld notice of req for detn [2:92-m-693] (cshl) [Entry date 04/09/92]

- 4/8/92 6 Fld CJA Form 23 (Financial Affidavit) as to Christopher Lee Armstrong
[2:92-m-693] (cshl) [Entry date 04/09/92]
- 4/8/92 7 Fld Report commencing criminal action dft as to Aaron Hampton arrested on 4/8/92
[2:92-m-693] (cshl) [Entry date 04/10/92]
- 4/8/92 8 MINUTES: first appearance of Aaron Hampton on cmplt, dft arrn, states t/n as chrgd, Attorney Paula Elden, apptd, panel, present; bail set at: temp detained for Aaron Hampton, preliminary exam set for 4/22/92 at 4:30 pm, PIA set for 4/27/92 at 8:30 am, detention hearing set for 4/9/92 at 2:00 pm govt moves for detn C/R: tape no 45 by Magistrate Judge Carolyn Turchin
[2:92-m-693] (cshl) [Entry date 04/10/92]
- 4/8/92 9 Fld notice dir dft to app for prelim hrg and for arrn on indict/info
[2:92-m-693] (cshl) [Entry date 04/10/92]
- 4/8/92 10 Fld notice of req for detn
[2:92-m-693] (cshl) [Entry date 04/10/92]
- 4/8/92 11 Fld CJA Form 23 (Financial Affidavit) as to Aaron Hampton
[2:92-m-693] (cshl) [Entry date 04/10/92]
- 4/8/92 21 Fld BENCH WARRANT returned executed as to Christopher Lee Armstrong 4/8/92
[2:92-m-693] (cshl) [Entry date 04/17/92]
- 4/8/92 22 Fld BENCH WARRANT returned executed as to Aaron Hampton 4/8/92
[2:92-m-693] (cshl) [Entry date 04/17/92]

- 4/9/92 12 MINUTES: Case called for perm detn hrg, dft, cust, present, atty Elden, panel, present, court finds prop cause to believe that the offense so chrgd has been commtd and that the dft commtd it, court finds pres under 18:3142e has not been rebutted and orders dft perm detained, detention hearing satisfied C/R: tape no 47 by Magistrate Judge Carolyn Turchin
[2:92-m-693] (cshl) [Entry date 04/10/92]
- 4/9/92 13 Fld ORDER of Detn of Aaron Hampton pending Trial by Magistrate Judge Carolyn Turchin
[2:92-m-693] (cshl) [Entry date 04/10/92]
- 4/13/92 14 Fld app for reconsideration of ord setting cond of release/detn ORDER by Magistrate Judge Carolyn Turchin bond hearing set for 4/13/92 at 2:00 pm (cc: all counsel)
[2:92-m-693] (cshl) [Entry date 04/17/92]
- 4/13/92 15 MINUTES: Govt app for reconsideration of detn is cont to 4/15/92 at 2:00 pm before Judge Turchin at the req of both cnsl C/R: tape no N/R by Magistrate Judge Carolyn Turchin
[2:92-m-693] (cshl) [Entry date 04/17/92]
- 4/13/92 16 Fld SUBSTITUTION of Attorney: replacing Guy Iverson with Carl K. Osborne apprvd by Magistrate Judge Carolyn Turchin
[2:92-m-693] (cshl) [Entry date 04/17/92]
- 4/15/92 17 Fld opposition to application for reconsideration of order setting conditions of release as to Christopher Lee Armstrong
[2:92-m-693] (cshl) [Entry date 04/17/92]

- 4/15/92 18 MINUTES: Case called dft, cust, bnd present, atty Osborne, retd, present, govts app for bail review re perm detn, mtn is granted, witnesses CST, court finds prob cause to believe that the offense so chrgd has been committed and that the dtf commtd it, exhibits marked, court finds pres undetr 18:31432e has not been rebutted and orders dft perm detained, bond hearing satisfied C/R: tape no 50 and 51 by Magistrate Judge Carolyn Turchin [2:92-m-693] (cshl) [Entry date 04/17/92]
- 4/15/92 19 Fld ORDER of Detn of Christopher Lee Armstrong pending Trial by Magistrate Judge Carolyn Turchin [2:92-m-693] (cshl) [Entry date 04/17/92]
- 4/15/92 20 Fld exhibit and witnesses list [2:92-m-693] (cshl) [Entry date 04/17/92]
- 4/21/92 23 Fld INDICTMENT counts filed against Christopher Lee Armstrong (1) count(s) 1, 2, 5-8, 3-4, 9, Robert Rozelle (2) count(s) 1, 5, 3-4, Aaron Hampton (3) count(s) 1, 2, 6-8, 9, Freddie Mack (4) count(s) 1, 2, Shelton Auntwan Martin (5) count(s) 1, 3-4, 5 (bh) [Entry date 04/23/92]
- 4/21/92 — Docket Modification (Utility Event) preliminary exam satisfied Indict fld (bh) [Entry date 04/24/92]
- 4/21/92 — BENCH WARRANT issued for Robert Rozelle by Magistrate Judge Rupert J. Groh Jr. (bh) [Entry date 04/24/92]
- 4/21/92 — BENCH WARRANT issued for Freddie Mack by Magistrate Judge Rupert J. Groh Jr. (bh) [Entry date 04/24/92]

- 4/21/92 — BENCH WARRANT issued for Shelton Auntwan Martin by Magistrate Judge Rupert J. Groh Jr. (bn) [Entry date 04/24/92]
- 4/21/92 — Docket Modification (Utility Event) Detention for Robert Rozelle (bh) [Entry date 04/24/92]
- 4/21/92 — Docket Modification (Utility Event) Detention for Freddie Mack (bh) [Entry date 04/24/92]
- 4/21/92 — Docket Modification (Utility Event) Detention for Shelton Auntwan Martin (bh) [Entry date 04/24/92]
- 4/21/92 24 Fld cr72 by AUSA Nick Hanna as to Christopher Lee Armstrong (bh) [Entry date 04/24/92]
- 4/21/92 25 Fld cr72 by AUSA Nick Hanna as to Robert Rozelle (bh) [Entry date 04/24/92]
- 4/21/92 26 Fld cr72 by AUSA Nick Hanna as to Aaron Hampton (bh) [Entry date 04/24/92]
- 4/21/92 27 Fld cr72 by AUSA Nick Hanna as to Freddie Mack (bh) [Entry date 04/24/92]
- 4/21/92 28 Fld cr72 by AUSA Nick Hanna as to Shelton Auntwan Martin (bh) [Entry date 04/24/92]
- 4/27/92 31 MINUTES: dft Christopher Lee Armstrong, Aaron Hampton arraigned and sts T/N as charged; Retained Attorney Carl K Osborne for dft Armstrong, Crt appts cnsl Panel atty Timothy C Lannen for dft Hampton, both are present; case reassigned to Judge Consuelo B. Marshall, arraignment con'd 4/27/92 at 1:30 pm C/R: Tape #693 by Mag Judge Joseph Reichmann (lj) [Entry date 05/06/92]

- 4/27/92 32 Fld stmnt of dft's constitutional rights as to Christopher Lee Armstrong (1j) [Entry date 05/06/92]
- 4/27/92 33 Fld DESIGNATION AND APPEARANCE of Attorney for Christopher Lee Armstrong by Carl K. Osborne (1j) [Entry date 05/06/92]
- 4/27/92 34 Fld stmnt of dft's constitutional rights as to Aaron Hampton (1j) [Entry date 05/06/92]
- 4/27/92 35 Fld CJA Form 23 (Financial Affidavit) as to Aaron Hampton (1j) [Entry date 05/06/92]
- 4/27/92 36 MINUTES: Plea & Trial setting dft Christopher Lee Armstrong, Aaron Hampton arraigned; N/G plea entered as to Armstrong ct 1 & 9 and as to Hampton Ct 1, 2, 6-9; Attorneys present; Dfts Robert Rozelle, Freddie Mack and Shelton Auntwan Martin are fugitives, Hrg on motns and for status hearing set 6/29/92 at 1:30 pm, pretrial motions shall be fld NLT 6/8/92, any oppos to such mot shall be fld NLT 6/15/92; any reply to oppos shall be fld NLT 6/22/92, jury trial set 6/30/92 at 9:30 am C/R: E. Mays by Judge Consuelo B. Marshall (1j) [Entry date 05/06/92]
- 4/29/92 29 Fld BENCH WARRANT returned unexecuted for Freddie Mack (sm) [Entry date 05/04/92]
- 4/29/92 30 Fld BENCH WARRANT returned unexecuted for Robert Rozelle (sm) [Entry date 05/04/92]

- 5/6/92 37 Fld dft Christopher Lee Armstrong's applica for review of Order setting conditions of detn pending trial & ORDER by Judge Consuelo B. Marshall — It is ORD that this applic is granted cal for hrg before Judge Consuelo B. Marshall, bond hearing set 5/14/92 at 8:00 am (1j) [Entry date 05/11/92]
- 5/14/92 38 MINUTES: bond hearing — Dft's motn to set bail — Crt questions PSA and counsel. PSA to confirm prior employment. Crt finds dft is not a flight risk, but is a danger to the community, bond hearing cont'd 5/20/92 at 8:00 am C.R: E. Mays by Judge Consuelo B. Marshall (1j) [Entry date 05/21/92]
- 5/18/92 39 Fld Pltf's EX PARTE Application for Ord compelling dfts to submit undisguised handwriting exemplars. Lodged Ord. (1j) [Entry date 05/21/92]
- 5/18/92 40 Fld Supplemental declr of Lawrence H. Cho in support of Ord for handwriting exemplars regarding [39-1] (1j) [Entry date 05/21/92]

- 5/18/92 41 Fld ORDER by Magistrate Judge George H. King granting motion [39-1] It is ORD — Dft Armstrong will provide to authorized rep of the Bureau of Alcohol, Tobacco, and Firearms and the Inglewood Police Dept undisguised handwriting exemplars purs to the directions and instructions of the agents. Dft shall provide the type of handwriting requested, that is for example, printing and/or cursive, and shall cooperate in all respects in providing the exemplars. (lj) [Entry date 05/26/92]
- 5/19/92 — ORDER by Judge Consuelo B. Marshall granting motion [43-1])lj) [Entry date 05/26/92]
- 5/20/92 42 MINUTES: bond hearing as to dft Christopher L. Armstrong's motn to set bail, Bail is argued and denied. Crt finds that dft is a danger to the community, but not a flight risk for Christopher Lee Armstrong C/R: E. Mays by Judge Consuelo B. Marshall (lj) [Entry date 05/26/92]
- 5/20/92 43 EX PARTE Application for Ord compelling dfts to su (lj) [Entry date 05/26/92]
- 5/22/92 44 Fld Ntc of mot and MOTION to compel disclosure of the identities and locations of informants or to dismiss the indictment; Memo of PA by defendant Aaron Hampton returnable on 7/13/92 at 1:30 pm (lj) [Entry date 05/26/92]

- 5/28/92 50 Fld ntc of mot and mot for pretrial discovery and for disclosure of informant by defendant Christopher Lee Armstrong, discovery requests, memo of pts and auth in support thereof returnable on 7/13/92 (mc) [Entry date 06/23/92]
- 6/4/92 51 Fld SUBSTITUTION of Attorney: Lydia Sanchez replacing attorney Carl K. Osborne for Christopher Lee Armstrong by Judge Consuelo B. Marshall (mc) [Entry date 06/23/92]
- 6/8/92 52 Fld STIP and order re cont of trial date and excl time by Judge Consuelo B. Marshall: It is so ord that the trial date be cont to 7/28/92. The per from 5/6/92 to 5/20/92 and 5/22/92 to 7/13/92 is excl time. (mc) [Entry date 06/23/92]
- 6/9/92 53 Fld EXCLUDABLE DELAY FORM as to Christopher Lee Armstrong, Robert Rozelle, Aaron Hampton, Freddie Mack, Shelton Auntwan Martin. Excl per from 5/6/92 to 5/20/92 and 5/22/92 to 7/13/92 (mc) [Entry date 06/23/92]
- 6/9/92 54 MINUTES: Stat conf set for 6/29/92 is taken off cal. C/R: n/a by Judge Consuelo B. Marshall (mc) [Entry date 06/23/92]
- 6/11/92 45 Fld Report commencing criminal action DEFENDANT as to Shelton Auntwan Martin arrested on 6/11/92 (bh) [Entry date 06/11/92]
- 6/11/92 46 Fld CJA Form 23 (Financial Affidavit) as to Shelton Auntwan Martin (bh) [Entry date 06/11/92]
- 6/11/92 47 Fld NOTICE of request for det as to dft Shelton Auntwan Martin (bh) [Entry date 06/11/92]

- 6/11/92 48 MINUTES: First appr of Shelton Auntwan Martin, Atty Barbara O'Connor apptd-DFPD present. Detention Bond set for Shelton Martin. Arrn set for 6/15/92 at 8:30 am C/R: tape no 63 by Magistrate Judge Rupert J. Groh Jr. (bh) [Entry date 06/11/92]
- 6/11/92 49 NOTICE directing dft Shelton Auntwan Martin to appr for PIA. (bh) [Entry date 06/11/92]
- 6/15/92 55 MINUTES: Dft Shelton Auntwan Martin arraigned; not guilty plea entered; Attorney Barbara O'Connor PD present. Case prev assigned to Judge Consuelo B. Marshall. Jury trial set for 7/28/92 at 9:30 am. C/R: Tape nos. 700/701 by Magistrate Judge Carolyn Turchin (mc) [Entry date 06/23/92]
- 6/15/92 56 Fld stmt of dft's constitutional rights as to Shelton Auntwan Martin (mc) [Entry date 06/23/92]
- 6/17/92 57 Fld BENCH WARRANT returned executed as to Shelton Auntwan Martin 6/11/92 (mc) [Entry date 06/23/92]
- 6/19/92 58 Fld info establishing prior fel narcotics conviction of dft Aaron Hampton (mc) [Entry date 06/24/92]
- 6/24/92 70 Fld ntc of mot, mot to strike prejudicial and inflammatory surplusage from indict, memo, decl of cnsl, exh of pts and auth by dft Shelton Auntwan Martin returnable on 7/13/92 (mc) [Entry date 07/13/92]
- 6/30/92 59 Fld EX PARTE Applic by pltf for ord perm rel of G/J testimony (m) [Entry date 07/01/92]

- 7/2/92 63 Fld ORDER perm rel of G/J testimony by Judge Consuelo B. Marshall. It is ord that pltf USA is dir to supply dfts through their cnsl of rec G/J testimony. (mc) [Entry date 07/10/92]
- 7/6/92 60 Fld EX PARTE Applic by dft Shelton Auntwan Martin for ord shortening time, decl of cnsl (mc) [Entry date 07/07/92]
- 7/6/92 61 Fld NOTICE of Joinder by dft Shelton Auntwan Martin joining mot for pretrial discovery, mot for disclosure of informant and mot to compel disclosure of the identities and locations of informants or to dismiss indict (mc) [Entry date 07/07/92]
- 7/7/92 62 Fld EX PARTE Applic by dft Shelton Auntwan Martin for ord shortening time, decl of cnsl (mc) [Entry date 07/07/92]
- 7/8/92 64 Fld govt's ntc of filing in camera, under seal (mc) [Entry date 07/10/92]
- 7/8/92 65 Fld SEALED doc: govt's in camera submission of decl of Agent Jeffrey Cochran (mc) [Entry date 07/10/92]
- 7/8/92 66 Fld ORDER shortening time by Judge Consuelo B. Marshall It is hereby ord that time be shortened to allow filing and serving of his mot for Discl of Information re: Informant as to Shelton Auntwan Martin (mc) [Entry date 07/10/92]
- 7/8/92 67 Fld ntc of mot and mot for disclosure of information re informant, memo of pts and auth, decl of cnsl, exh by dft Shelton Auntwan Martin returnable on 7/13/92 (mc) [Entry date 07/10/92]

- 7/8/92 68 Fld govt's response to dfts mots for discovery and disclosure of informants, memo of pts and auth, govt's in camera filing re informant (mc) [Entry date 07/13/92]
- 7/9/92 69 Fld ORDER shortening time by Judge Consuelo B. Marshall It is hereby ord that time be shortened to allow the filing and serving of this Mot to Strike Prejudicial and Inflammatory Surplusage from the Indict (mc) [Entry date 07/13/92]
- 7/9/92 72 Fld STIPULATION and order re cont of trial date and exl time by Judge Robert M. Takasugi: It is so ord that the pres trial date is cont to 8/18/92 at 9:30 am. The per frm 6/11/92 to 8/18/92 is excl (mc) [Entry date 07/17/92]
- 7/9/92 73 Fld EXCLUDABLE DELAY FORM as to Christopher Lee Armstrong, Aaron Hampton, Shelton Auntwan Martin. Excl per frm 6/11/92 to end 8/18/92 (mc) [Entry date 07/17/92]
- 7/13/92 71 Fld of Joinder by dft Aaron Hampton joining motion for pretrial discovery and disclosure of informant (mc) [Entry date 07/15/92]

- 7/13/92 86 MINUTES: Mots-Martin: to strike prejudicial and inflammatory surplusage from indict GR, GR as to items 1 & 6. GR as to item #4 to be provided to defense cnsl f/w, GR as to items 5 & 7 to be provided to defense cnsl 2 wks prior to trial, as to item #2, govt's cnsl to inquire of informants of dft's request to interview informants, GR as to items 9 & 10. Mot-Hampton: same ruling as to identical mot fld by dft Martin. GR as to item #5, to be provided f/w to defense cnsl, GR as to item #6, to be provided to defense cnsl 2 wks prior to trial. Mots-Armstrong: GR as to items #6, 8, 10, 37, 38, 43. GR in part/denied as to items 25, 35. GR as to item 41 as to business address only. No ruling as to item #32 re personnel file of Mr. Campbell. C/R: Esther Mays by Judge Consuelo B. Marshall (mc) [Entry date 08/13/92]
- 7/17/92 75 Fld ORDER by Judge Consuelo B. Marshall. It is hereby ord that in the absence of justification by BOP dft Shelton Auntwan Martin be allowed visitation at the MDC by his fiancée, Trina Williams (mc) [Entry date 07/22/92]
- 7/20/92 74 Fld ntc of mot, mot for for discovery and ord dismissal of indict for selective prosecution, memo of pts and auth, decl by df Shelton Auntwan Martin returnable on 8/17/92 (mc) [Entry date 07/20/92]

- 7/24/92 76 Fld EX PARTE Applic by dft Aaron Hampton for an ord perm expenditure of CJA funds for an investigator, decl of Timothy C. Lannen (mc) [Entry date 07/29/92]
- 7/24/92 77 Fld NOTICE of Joinder by dft Christopher Lee Armstrong joining mot to dismiss indict for selective prosecution by dft Sheldon Auntwan Martin [74-2] (mc) [Entry date 07/30/92]
- 7/27/92 78 Fld ORDER permitting expenditure of CJA funds for an investigator by Judge Consuelo B. Marshall (mc) [Entry date 07/30/92]
- 7/30/92 79 Fld NOTICE of Joinder by dft Aaron Hampton joining mot for discovery and ord dismissal of indict for selective prosecution [74-1], [74-2] (mc) [Entry date 08/06/92]
- 8/6/92 80 Fld Report commencing criminal action DEFENDANT as to Robert Rozelle arrested on 8/5/92 (mc) [Entry date 08/07/92]
- 8/6/92 81 MINUTES: First appearance of Robert Rozelle on indict Attorney present. Govt mvs for detn/granted w/o prej. Bail set at: detn for Robert Rozelle, post indict arrn set for 8/10/92 at 8:30 am. C/R: Tape no. 60 by Magistrate Judge George H. King (mc) [Entry date 08/07/92]
- 8/6/92 82 Fld ORDER of Detention of Robert Rozelle after hrg by Magistrate Judge George H. King (mc) [Entry date 08/07/92]
- 8/6/92 83 Fld NOTICE of request for detn by pltf (mc) [Entry date 08/07/92]

- 8/6/92 84 Fld CJA Form 23 (Financial Affidavit) as to Robert Rozelle (mc) [Entry date 08/07/92]
- 8/6/92 85 Fld NOTICE dir dft to app for arrn on indict/info by dft Robert Rozelle (mc) [Entry date 08/07/92]
- 8/10/92 89 MINUTES: Dft Robert Rozelle arrn; Attorney Timothy C. Lannen pres, arrn cont to 8/10/92 at 11:30 am. C/R: Tape no. 709 by Magistrate Judge Robert M. Stone (mc) [Entry date 08/13/92]
- 8/10/92 90 Fld stmt of dft's constitutional rights as to Robert Rozelle (mc) [Entry date 08/13/92]
- 8/10/92 94 Fld STIPULATION and order re cont of trial date and excl time by Judge Consuelo B. Marshall: It is so ord that trial date cont to 10/6/92. The per from 8/18/92 to 10/6/92 is excl time. (mc) [Entry date 08/26/92]
- 8/10/92 95 Fld EXCLUDABLE DELAY FORM as to Christopher Lee Armstrong, Aaron Hampton, Shelton Auntwan Martin. Excl per began 8/18/92 and end on 10/6/92 (mc) [Entry date 08/26/92]
- 8/10/92 112 MINUTES: Dft Robert Rozelle arrn; not guilty plea ent; Attorney present. Crt ord matter set for jury trial on 10/6/92 at 9:30 am. Crt sets matter for hrg on mots and for stat conf on 9/21/92 at 1:30 pm. All mots shl be fld on or bef 9/1/92, any opp to such mots shl be fld on or bef 9/7/92, any reply to opp shl be fld on or bef 9/14/92. Esther May by Judge Consuelo B. Marshall (mc) [Entry date 09/24/92]

- 8/11/92 87 Fld BENCH WARRANT returned executed as to Robert Rozelle 8/5/92 (mc) [Entry date 08/13/92]
- 8/11/92 88 Fld govt's opp to dfts mots for discovery and/or dismiss of indict for selective prosecution, memo of p/a (mc) [Entry date 08/13/92]
- 8/13/92 91 Fld NOTICE of Joinder by defendant Robert Rozelle joining motion to dismiss indict returnable on 8/17/92 [74-2] (mc) [Entry date 08/18/92]
- 8/17/92 105 MINUTES: Dfts mot for discovery and or/dism of indict cont to 9/8/92 at 8:00 am. Reply mots shl be fld nlt 8/27/92. C/R: Esther Mays by Judge Consuelo B. Marshall (mc) [Entry date 09/08/92]
- 8/19/92 93 Fld SEALED doc by pltf USA: govt's ex parte applic for ord shortening time to file mot for taking of deposition (mc) [Entry date 08/26/92]
- 8/20/92 92 Fld govt's opp to govt's mot for taking dep of a wit, memo of p/a by Robert Rozelle in opp (mc) [Entry date 08/25/92]
- 8/20/92 104 Fld SEALED doc by dft Shelton Auntwan Martin (mc) [Entry date 09/03/92]
- 8/21/92 96 Fld opp by dft Aaron Hampton to govt's mot for taking deposition of a wit (mc) [Entry date 08/26/92]
- 8/21/92 97 Fld of Joinder by dft Shelton Auntwan Martin in mot of dft Robert Rozelle (mc) [Entry date 08/26/92]
- 8/21/92 98 Fld supplemental decl in support of dft's opp to govt's mot for deposition as to Shelton Auntwan Martin (mc) [Entry date 08/26/92]

- 8/21/92 99 Fld NOTICE of in camera filing by pltf USA (mc) [Entry date 08/26/92]
- 8/21/92 100 Fld SEALED doc by pltf USA: govt's in camera submission of decl of Agent Jeffrey Cochran re: former testimony of confidential informant, exh A attached (mc) [Entry date 08/26/92]
- 8/24/92 101 Fld NOTICE by dft Shelton Auntwan Martin of under seal filing (mc) [Entry date 08/26/92]
- 8/25/92 102 MINUTES: On the crt's own mot, govt's mot for the taking of the depo of wit is set for oral arg on 8/31/92 at 1:30 pm. C/R: N/A by Judge Consuelo B. Marshall (mc) [Entry date 08/31/92]
- 8/25/92 103 Fld supplemental opp to govt's mot for taking depo of a wit, joinder in mots of dft Robert Rozelle and Shelton Auntwan Martin by dft Aaron Hampton (mc) [Entry date 08/31/92]
- 8/31/92 107 MINUTES: Govt's crsl w/d mot to take depo of wit. C/R: Esther Mays by Judge Consuelo B. Marshall (mc) [Entry date 09/11/92]
- 9/3/92 106 Fld applic for review of ord setting conds of rel/detn, pend trial and ORDER. Hrg set for 9/8/92 at 8:00 am. (mc) [Entry date 09/08/92]
- 9/8/92 110 MINUTES: Mot dfts for discovery granted, mot to dismiss indict taken off cal. Cont to 9/16/92 at 8:00 am for stat conf. Mot dft Armstrong to set bail arg and den. Crt finds that dft Armstrong is a danger to the community. C/R: Esther Mays by Judge Consuelo B. Marshall (mc) [Entry date 09/22/92]

- 9/16/92 108 Fld SEALED doc by pltf USA: govt's mot for reconsid of ord for discovery re selective prosecution, memo of p/a, decls (mc) [Entry date 09/16/92]
- 9/16/92 111 MINUTES: Stat conf is cont to 9/21/92 at 1:30 pm. C/R: n/a by Judge Consuelo B. Marshall (mc) [Entry date 09/22/92]
- 9/17/92 109 Fld RECEIPT for Transcripts of proceedings held on: 9/8/92 (mc) [Entry date 09/18/92]
- 9/21/92 114 MINUTES: Stat conf and govt's mot for reconsid cont to 10/19/92 at 1:30 pm. Trial cont to 11/17/92 at 9:30 am. Opp to mots shl be fld nlt 10/5/92. C/R: Esther Mays by Judge Consuelo B. Marshall (mc) [Entry date 10/09/92]
- 10/5/92 113 Fld dft's opp to govt's mot for reconsid of ord for disc re selective prosecution, decls of Marla Beller and cnsl by dft Shelton Auntwan Martin (mc) [Entry date 10/07/92]
- 10/8/92 115 Fld STIPULATION and order re cont of trial date and excl time by Judge Consuelo B. Marshall (mc) [Entry date 10/14/92]
- 10/9/92 116 Fld EXCLUDABLE DELAY FORM as to Christopher Lee Armstrong, Robert Rozelle, Aaron Hampton, Shelton Auntwan Martin. Excl per from 7/20 — 9/8, 9/16 — 10/19, 9/22 — 11/17 (mc) [Entry date 10/14/92]
- 10/19/92 117 MINUTES: Cont to 10/26/92 at 1:30 pm for stat conf. C/R: Esther Mays by Judge Consuelo B. Marshall (mc) [Entry date 10/22/92]

- 10/26/92 120 MINUTES: Stat conf is cont to 11/2/92 at 1:30 pm. Lydia Sanchez, Phil Johnson and Julie Ireland are rel as cnsl for dft Armstrong. C/R: Esther Mays by Judge Consuelo B. Marshall (mc) [Entry date 11/12/92]
- 11/2/92 118 MINUTES: David Reed is appt to represent Christopher Lee Armstrong. Mots cont to 11/16/92 at 1:30 pm, trial cont to 1/12/93 at 9:30 am. C/R: Esther Mays by Judge Consuelo B. Marshall (mc) [Entry date 11/09/92]
- 11/9/92 119 Fld Joinder in selective enforcement discov mot by dft Christopher Lee Armstrong, supplemental decl by David R. Reed (mc) [Entry date 11/10/92]
- 11/12/92 121 Fld RULE 40 Documents received from Dist of Oklahoma at Oklahoma City as to Freddie Mack (mc) [Entry date 11/13/92]
- 11/13/92 122 Fld Report commencing criminal action DEFENDANT as to Freddie Mack arrested on 11/12/92 (mc) [Entry date 11/17/92]
- 11/13/92 123 Fld NOTICE of request for detn as to Freddie Mack (mc) [Entry date 11/17/92]
- 11/13/92 124 Fld CJA Form 23 (Financial Affidavit) as to Freddie Mack (mc) [Entry date 11/17/92]
- 11/13/92 125 MINUTES: First appearance of Freddie Mack on indict. Atty David Bortman pres. Bail set at: perm detn for Freddie Mack, PIA set for 11/16/92 at 8:30 am. C/R: no. 167 by Mag Judge Jay R. Irwin (mc) [Entry date 11/17/92]

- 11/13/92 126 Fld ORDER of Detention of Freddie Mack after hrg by Mag Judge Jay R. Irwin (mc) [Entry date 11/17/92]
- 11/13/92 127 Fld NOTICE dir dft to app for arrn on indict/info by dft Freddie Mack (mc) [Entry date 11/17/92]
- 11/16/92 128 MINUTES: Dft Freddie Mack arrn; Attorney David Bortman Panel pres, arrn cont to 11/16/92 at 11:30 am. C/R: Tape no. 255 by Magistrate Judge Elgin C. Edwards (mc) [Entry date 11/18/92]
- 11/16/92 129 Fld stmt of dft's constitutional rights as to Freddie Mack (mc) [Entry date 11/18/92]
- 11/16/92 130 MINUTES: Dft Freddie Mack arrn; not guilty plea ent. Attorney pres. Set for stat conf and hrg on mots on 1/4/93 at 1:30 pm, mots to be fld nlt 12/15/92, opp nlt 12/21/92, replies shl be fld nlt 12/28/92. Trial set for 1/12/93 at 9:30 am. C/R: Esther Mays by Consuelo B. Marshall (mc) [Entry date 11/19/92]
- 11/18/92 131 Fld BENCH WARRANT returned executed as to Freddie Mack 11/6/92 (mc) [Entry date 11/19/92]
- 11/30/92 132 Fld NOTICE of under seal filing by pltf USA (mc) [Entry date 12/01/92]
- 11/30/92 133 Fld SEALED doc by pltf USA: govt's supplemental decl of Robert Wall in support of govt's mot for reconsid of ord re discov on selective prosecution (mc) [Entry date 12/03/92]
- 11/30/92 137 MINUTES: Stat conf cont's to 12/4/92 at 2:30 pm. C/R: Esther Mays by Judge Consuelo B. Marshall (mc) [Entry date 01/08/93]

- 12/4/92 134 MINUTES: Dfts mot re: selective prosecution arg and submitted w/o furth oral arg. Purs to oral stip, trial is adv to 1/5/93 at 9:30 am. C/R: Esther Mays by Judge Consuelo B. Marshall (mc) [Entry date 12/07/92]
- 12/9/92 135 Fld EX PARTE Motion by dft Christopher Lee Armstrong for the appt of an investigator and ord thereon (mc) [Entry date 12/10/92]
- 12/9/92 135 Fld ORDER appt investigator by Judge Consuelo B. Marshall: It is hereby ord that Mr. David Reed has approval to retain lic investigator, William Solorzano, whose fees are not to exceed \$1,500.00 at time. (mc) [Entry date 12/10/92]
- 12/9/92 138 ORDER detention hearing set for 12/11/92 at 9:00 am. (cc: all counsel) (mc) [Entry date 01/08/93]
- 12/11/92 139 MINUTES: Detn hrg held as to Freddie Mack. Bail set: \$60,000 a/b, full just w/deeding, 3rd pty sur (dft's mother), int PSA supv, trvl rest to CDC, not ent premises of any airport, seaport term which perm exit from continental U.S. w/o Crt perm, not ent premises of any bus railroad, airport or seaport term which permits exit from area of rest trvl w/o Crt perm, not use or poss ill drugs, drug and alcohol testing as deemed nec by PSA, nt poss firearms/dest devices, reside w/mother and not reside elsewhere w/o perm of Crt or PSA, not use false names, turnover false identifications to PSA Bond set for Freddie Mack. C/R: Esther Mays by Judge (mc) [Entry date 01/08/93]

- 12/17/92 140 Fld AFFIDAVIT of sur (prpty) by Mattie J. Mack as to dft Freddie Mack. Re: prpty address: 465 Eldora Rd., Pasadena, CA 91104 and cc deed of trust Inst. no. 92-2343001. Sent to exh (mc) [Entry date 01/08/93]
- 12/17/92 141 Fld BOND AND CONDITIONS OF RELEASE \$60,000.00 a/b w/just affid of sur and deeding of prpty by dft's mother, trvl rest to CDC, PSA supv, not ent premises of any airport, seaport term which perm exit from continental U.S. w/o Crt perm, not ent premises of any bus, railroad, airport or seaport term which perm exit from area of rest trvl w/o Crt perm, not use or poss ill drugs, drug and alcohol test as deemed nec by PSA, not poss firearms/destructive devices, reside w/mother, could not reside elsewhere w/o perm of Crt and PSA, not use false names and turnover false identifications to PSA for Freddie Mack approved by Magistrate Judge Rupert J. Groh Jr. (mc) [Entry date 01/08/93]
- 12/22/92 136 Fld information establishing prior fel narcotics conv of Robert Rozelle (mc) [Entry date 12/28/92]
- 12/22/92 142 Fld supplemental filing re dft's mot for discov re selective prosecution, decl of cnsl, exh as to Shelton Auntwan Martin (mc) [Entry date 01/08/93]
- 12/28/92 143 Fld MOTION in limine to excl evid purs to Fed Rule of Evid 104 by dft Christopher Lee Armstrong, memo of p/a returnable on 1/5/93 (mc) [Entry date 01/08/93]

- 12/29/92 144 MINUTES: Christopher Armstrong, et al: Govt's mot for reconsid of Crt's ruling is den. C/R: N/A by Judge Consuelo B. Marshall (mc) [Entry date 01/08/93]
- 12/29/92 145 Fld EX PARTE Applic by dft Shelton Auntwan Martin for ord shortening time, decl of cnsl (mc) [Entry date 01/08/93]
- 12/30/92 146 Fld EX PARTE Applic by dft Shelton Auntwan Martin for ord shortening time, decl of cnsl (mc) [Entry date 01/09/93]
- 1/4/93 147 Fld Joinder by dft Aaron Hampton joining mot in limine to excl evid purs to Fed Rule of Evid 104 by dft Christopher Lee Armstrong returnable on 1/5/93 [143-1] (mc) [Entry date 01/08/93]
- 1/5/93 148 Fld MOTION in limine to excl evid by dft Freddie Mack returnable on 1/5/93 (mc) [Entry date 01/08/93]
- 1/5/93 149 Fld EX PARTE Applic by dft Christopher Lee Armstrong for perm to submit interim CJA vouchers for legal serv, decl of David Reed, ord thereon (mc) [Entry date 01/08/93]
- 1/5/93 — ENDORSED Order gr motion [149-1] by Judge Consuelo B. Marshall (mc) [Entry date 01/08/93]
- 1/5/93 150 MINUTES: Mot of dfts to dismiss indict is granted. Govt's mot to stay dismiss for 48 hrs is granted. Cont to 1/8/93 at 10 am as to dfts Martin, Armstrong and Rozelle for a stat conf and bail mots. Crt ord that Mack shl remain on bnd and upon same conds of rel. C/R: Esther Mays by Judge Consuelo B. Marshall (mc) [Entry date 01/08/93]

- 1/6/93 151 Fld NOTICE of Appeal to Circuit Court by pltf USA re ord dismiss indict as to dfts Aaron Hampton, Robert Rozelle, Freddie Mack and Shelton Auntwan [150-2] (cc: all counsel) Fee Status: Bill wv (mc) [Entry date 01/08/93]
- 1/8/93 156 MINUTES: Govt's mot for stay of dismiss appeal granted. Mot of dft Armstrong to set bail cont to 01/19/93 at 2:30 pm. Mot to set bail as to dft Rozelle deemed to be moot, denied as to dft Hampton. Mot granted as to dft Martin as follows: \$15,000 a/b w/ full just and deed of prop, int PSA supv, not to possess firearms or dangerous devices, not associate w/ others who poss firearms, reside w/ uncle Mr. Fisher, travel restr to CDC, not enter premises of egress from CDC, not use or possess false ID and turn over false ID to PSA, not contact wits C/R: Esther Mays, by Judge Consuelo B. Marshall (mei) [Entry date 01/21/93]
- 1/11/93 153 Fld RECEIPT for Transcripts of proceedings held on: 12/4/92 as to Christopher Lee Armstrong (mc) [Entry date 01/12/93]
- 1/12/93 154 Fld ORDER for time schedule transcript designation due: 1/29/93, C/R transcripts due: 2/28/93, Appellant's briefs due: 4/9/93, Appellee's reply brief due: 5/9/93 Appellant's filing of excerpts of record due: 5/23/93 (mc) [Entry date 01/14/93]
- 1/14/93 155 Fld RECEIPT for Transcripts of proceedings held on: 1/5/93 (mc) [Entry date 01/15/93]

- 1/19/93 — Docket Modification (Utility Event) As to Robert Rozelle and Aaron Hampton, mot to set bail as to dft Rozelle deemed to be moot, denied as to dft Hampton (mei) [Entry date 01/21/93]
- 1/19/93 157 MINUTES: As to dft Armstrong pres and in custody, mot of govt's cnsl to dismiss indictment as to dft Armstrong granted. Dft's mot to set bail denied, crt finds that dft is a danger to the community. Crt ord that dft remain detn, exhs 1, 2, 3, 3A, and 4 are adm into evid C/R: Esther Mays, by Judge Consuelo B. Marshall (mei) [Entry date 01/21/93]
- 1/19/93 — Docket Modification (Utility Event) case dismissed as to Christopher Lee Armstrong (1) as to all counts 1-9. Motion of government's counsel to dismiss Indictment as to defendant Armstrong is granted (mei) [Entry date 01/21/93]
- 1/20/93 158 Fld NOTICE of Appeal to Circuit Court by plaintiff USA, as to defendant Christopher Lee Armstrong [157-1] Govt appealing ord dismiss indict as to dft Armstrong (cc: all counsel) Fee Status: fees wvd, frms gvn, TDO gvn (mei) [Entry date 01/21/93]

GENERAL DOCKET FOR
NINTH CIRCUIT COURT OF APPEALS

Court of Appeals Docket
No. 93-50031

USA

v.

ARMSTRONG, ET AL.

APPEAL FROM: CENTRAL DISTRICT OF CALIFORNIA,
LOS ANGELES

Filed: 1/13/93
Nsuit: 0

- 1/13/93 1 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C on 12/22/92.; setting schedule as follows: transcript shall be ordered by 1/29/93 for USA; transcript shall be filed by 3/1/93; appellants' briefs, excerpts due by 4/9/93 for USA; appellees' brief due 5/10/93 for Christopher Lee Armstrong; appellants' reply brief due by 5/24/93 for USA. (RT required: yes.) (Sentence imp: N/A.) [93-50031] (jhc) [93-50031]
- 1/19/93 2 Filed Appellant USA's motion to expedite appeal. -promo-[93-50031] served on 1/15/93 [2289485] [93-50031] (ec) [93-50031]
- 2/16/93 4 Filed order (Deputy Clerk: mg) the court is in receipt of the Govt's motions to consolidate 93-50031 and 93-50057 and to expedite the appeals. The motions are granted. Appeals 93-50031 and 93-50057 are consolidated. The expedited briefing schedule is as follows: opening brief due Mar 1, 1993; aple's brief due Mar 31, 1993. Optional reply brief due 14 days from service ans brief. Court records do not currently reflect that DC has issued the COR. Apl't shall monitor the issuance of the certificate ... These appeals shall be placed on the next available calendar after the filing of the ans brief. (Motion recvd 2/9/93) [93-50031, 93-50057] (ec) [93-50031 93-50057]

- 3/3/93 5 Filed original and 15 copies Appellant USA in 93-50031, Appellant USA in 93-50057 opening brief (Informal: n) 37 pages and five excerpts of record in 1 volume; served on 3/1/93 [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 3/29/93 6 14 day oral extension by phone of time to file appellee's brief denied—case expedited. [93-50031, 93-50057] (ra) [93-50031 93-50057]
- 4/2/93 8 Filed original and 15 copies Appellee Shelton Auntwan Martin in 93-50031 brief, 25 pages, 5 suppl. Exc.: served on 3/31/93 minor defcy: no Statement of Rel. Cases Notified counsel. [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 4/5/93 9 Filed motion of defendant Freddie Mack for joinder in co-defendant Shelton Auntwan Martin's ans brief and deputy clerk order: (Deputy Clerk: cg) granting motion & order [2327428-1] in 93-50031, 93-50057 (Motion recvd 3/31/93) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 4/8/93 11 Filed original and 15 copies appellees Aaron Hampton, Robert Rozelle 14 pages brief, ; served on 3/31/93 [93-50031] (ec) [93-50031]
- 4/12/93 14 Received Appellee Shelton Auntwan Martin in 93-50031 satisfaction of (minor) brief deficiency. (stmt. of related cases) [93-50031, 93-50057] (jlc) [93-50031 93-50057]

- 4/15/93 13 Filed motion and order: (Deputy Clerk: cag) granting motion of Christopher Lee Armstrong's to join in the ans brief of Co-Def Shelton C. Martin is granted. The optional reply brief shall be due 14 days from the date of this order. in 93-50057 (Motion recvd 4/12/93) [93-50031, 93-50057] (tsp) [93-50031 93-50057]
- 4/19/93 15 Filed original and 15 copies USA in 93-50031, USA in 93-50057 reply brief, (Informal: n) 12 pages; served on 4/15/93 [93-50031, 93-50057] (ft) [93-50031 93-50057]
- 4/21/93 17 Filed: (Deputy Clerk: cag) denying motion & order to file late brief. By way of the 4/15/93 clk's order the due date for the reply brief was changed to 4/29/93. Provided the brief was served by the date, the reply brief shall be filed upon receipt. It appearing that briefing is complete, this appeal is deemed ready for calendaring. [2337931-1] in 93-50031, 93-50057 (Motion recvd 4/19/93) [93-50031, 93-50057] (tsp) [93-50031 93-50057]
- 4/26/93 19 Filed record on appeal in 13 Vols. (total): 4 Clerks Rec 9 RTs (orig) [93-50031, 93-50057] [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 4/27/93 20 Calendar check performed [93-50031, 93-50057] (aw) [93-50031 93-50057]
- 4/30/93 21 Calendar materials being prepared. [93-50031, 93-50057] [93-50031, 93-50057] (aw) [93-50031 93-50057]
- 5/5/93 22 CALENDARED: Pasadena 1:30 p.m. 7/12/93 Courtroom 1 [93-50031, 93-50057] (th) [93-50031 93-50057]

- 5/28/93 24 Filed Christopher Lee Armstrong Notice to join in oral argument at July 12, 1993 hearing by co-cnsl Barbara O'Conner. Cnsl David R. Reed will not be present at the oral argument ... (Panel) [93-50057, 93-50031] [2361602] note: no proof of service (ec) [93-50031 93-50057]
- 7/12/93 26 ARGUED AND SUBMITTED TO Harlington Wood, Stephen R. REINHARDT, Pamela A. RYMER [93-50031 93-50057] (jhc) [93-50031 93-50057]
- 8/9/93 28 Received CJA voucher (Voucher #0610261 \$1726.50) from counsel (Joseph Walsh) for approval of claim. Sent deficiency letter, due 8/31 (crw) [93-50031] (mlm) [93-50031]
- 8/19/93 29 Received CJA voucher (Voucher #0606608 \$1692.86) from counsel (Lannen) for approval of claim. [93-50031] (ah) [93-50031]
- 8/25/93 30 Filed certificate of record on appeal RT filed in DC 4/8/93 [93-50031] (dr) [93-50031]
- 8/25/93 31 Filed certificate of record on appeal RT filed in DC 4/8/93 [93-50057] (dr) [93-50057]
- 9/14/93 33 CJA voucher (Voucher #0606608 \$1767.36c (atty T. Lannen) forwarded to panel judge SR for approval. [93-50031] (crw) [93-50031]
- 9/14/93 34 CJA voucher (Voucher #0610261 \$1762.50 (atty J. Walsh) forwarded to panel judge SR for approval. [93-50031] (crw) [93-50031]

- 9/27/93 36 CJA voucher (Voucher #0610261 \$1762.50) received from panel judge SR, approved. Sent to Administrative Judge DWN for approval of excess. (crw) [93-50031]
- 9/27/93 37 CJA voucher (Voucher #0606608 \$1767.36) received from panel judge SR, approved. Sent to Administrative Judge DWN for approval of excess. (crw) [93-50031]
- 10/5/93 38 Received CJA voucher (Voucher #0610261 \$1762.50) from Administrative Judge approving excess claim. (crw) [93-50031]
- 10/5/93 39 Received CJA voucher (Voucher #0606608 \$1767.36) from Administrative Judge approving excess claim. (crw) [93-50031]
- 10/27/93 40 Processed CJA voucher (Voucher #0610261 \$1762.50) for counsel (Joseph Francis Walsh in 93-50031) [93-50031] (crw) [93-50031]
- 10/29/93 41 Processed CJA voucher (Voucher #0606608 \$1767.36) for counsel (Timothy C. Lannen in 93-50031) [93-50031] (crw) [93-50031]
- 1/21/94 45 FILED OPINION: REVERSED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Harlington Wood, author; Stephen R. REINHARDT, dissentings; Pamela A. RYMER.) FILED AND ENTERED JUDGEMENT. [93-50031, 93-50057] (ck) [93-50031 93-50057]

- 2/8/94 46 [2512726] Filed original and 40 copies Appellee Shelton Auntwan Martin petition for rehearing with suggestion for rehearing en banc 12 p. pages, served on 2/4/94 (panel; active judges) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 2/8/94 48 [2513347] Filed original and 3 copies (made addl copies for court) Appellees Aaron Hampton, and Robert Rozelle in 93-50031 Joinder in petition for rehearing with suggestion for rehearing en banc filed by Shelton Auntwan Martin (1) page p. pages, served on 2/4/94 (panel; active judges) [93-50031] (ec) [93-50031]
- 2/10/94 50 Filed Aple Armstrong mtn to join in petition for rehearing of Robert Rozelle; served on 2/4/94 (Panel) [2516064-1] (gva) [93-50031 93-50057]
- 3/7/94 51 Received from Barbara O'Connor, Supr. Trial Atty., FPD, letter dated Mar 3, 1994 with a copy of USA v. Clary Finding and Conclusions of Law as suppl authority in support of petition for rehearing en banc (one copy only) note: notified cnsl to submit 39 addl copies (by fax) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 3/9/94 52 Received from Barbara E. O'Connor, Supvr. Trial Atty., letter dated Mar 67, 1993, w/39 addl copies of suppl. authority in support of Petition for Rehearing, with Suggestion for Rehearing en banc filed on half of defendant Martin (panel; active judges) citations, served on 3/3/94 [93-50031, 93-50057] (ec) [93-50031 93-50057]

- 4/20/94 55 Filed order (Harlington Wood, Stephen R. REINHARDT, Pamela A. RYMER,): The opinion and dissent filed Jan 21, 1994, slip. op. 599 and appearing at 14 F.3d 1387 (9th Cir. 1944) are withdrawn. A new opinion and dissent are filed in their place, and the petitions for rehearing and suggestion for rehearing en banc are dismissed as moot and without prejudice. [2512726-1] in 93-50031, 93-50057 [2513347-1] [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 4/20/94 56 FILED OPINION; REVERSED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Harlington Wood, author; Stephen R. REINHARDT, dissenting; Pamela A. RYMER.) FILED AND ENTERED JUDGMENT. [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 5/5/94 58 Filed order (Harlington Wood, Stephen R. REINHARDT, Pamela A. RYMER,): the issuance of the mandate shall be stayed pending further notice from the panel. [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 5/6/94 60 [2566004] Filed original and 40 copies Appellee Shelton Auntwan Martin in 93-50031 petition for rehearing with suggestion for rehearing en banc 14 p. pages, served on 5/4/94 (panel; active judges) [93-50031, 93-50057] (ec) [93-50031 93-50057]

- 5/9/94 62 Filed Joinder of Appellees Robert Rozelle and Aaron Hampton in the petition for rehearing and suggestion for rehearing en banc filed by appellee Shelton Auntwan Martin (panel; active judges) [93-50031] (ec) [93-50031]
- 5/25/94 65 Filed order (Harlington WOOD, Jr., Stephen R. REINHARDT, Pamela A. RYMER,): the aplt shall file a response to the petition for rehearing and suggestion for rehearing en banc not exceeding 15 pages in length setting forth its position on whether this case should be heard en banc. Forty copies of each brief shall be filed within 21 days from the date of this order. [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 6/17/94 66 Filed Appellant's USA response to petition for en banc rehearing [2566004-1] in 93-50031, 93-50057 served on 6/15/94 (panel; active judges) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 8/1/94 73 Filed order FOR PUBLICATION (J.C. WALLACE) upon the vote of a majority of nonrecused regular active judges of this ct, it is ordered that this case be reheard by the en banc court pursuant to Cir. Rule 35-3. [93-50031, 93-50057] (rc) [93-50031 93-50057]
- 8/3/94 70 CALENDARED: PASADENA Sept 22 1994 1:30 pm Courtroom 3 [93-50031, 93-50057] (aw) [93-50031 93-50057]

- 8/3/94 74 Filed order (J. C. WALLACE) oral argument in the above case shall be reheard en banc in Pasadena on Sept. 22, 1994, at 1:30 pm. The parties shall forward twenty (20) copies of their original briefs and excerpts of record on or before 8/17/94. (PHONED OUT: 4:00 pm) [93-50031, 93-50057] (rc) [93-50031 93-50057]
- 8/10/94 76 Filed order (J. C. WALLACE,): Within 21 days from the date of this order, the parties shall file simultaneous en banc briefs not to exceed fifteen pages. [93-50031, 93-50057] note: send briefs to panel by Fed. Express or overnight mail. (ec) [93-50031 93-50057]
- 8/12/94 79 Received orig. 20 copies Appellees Aaron Hampton, Robert Rozelle in 93-50031's brief of 14 pages; served on 3/31/93 (prev. filed April 2, 1993) note: submitted pursuant to court's order of Aug 3, 1993. -en banc panel- [93-50031] (ec) [93-50031]
- 8/15/94 80 Received 20 addl copies Appellant USA opening brief, 37 pages and Excerpts of Record (originally filed Mar 3, 1993), Served on 3/1/93 (en banc panel) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 8/15/94 81 Received 20 addl copies USA reply brief, 12 pages (originally filed April 19, 1993) -en banc panel- [93-50031, 93-50057] (ec) [93-50031 93-50057]

- 8/15/94 82 Received 20 addl copies appellee Shelton Auntwan Martin's brief of 25 pages (orig. filed April 2, 1993) -en banc panel- [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 8/15/94 83 [2626953] Received 20 addl copies Appellee Shelton Auntwan Martin petition for rehearing with suggestion for rehearing en banc (originally filed May 6, 1994) -en banc panel-, (ec) [93-50031 93-50057]
- 8/15/94 84 Received 20 addl copies Appellant USA response to petition for rehearing and suggestion for rehearing en banc, (originally filed June 17, 1994) served on 6/15/94. -en banc panel- [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 8/18/94 85 Received 20 addl copies Appellee's Shelton Auntwan Martin supplemental excerpts of record on appeal in 1 vol. (originally filed 4/2/93) -en banc panel- (ec) [93-50031 93-50057]
- 8/18/94 86 Received ltr dated 8/15/94 from Aple Armstrong re: I hereby transmit this complaint and request that you appoint an indepenent csl, pursuant to 28 U.S.C. 591, to investigate the misconduct of U.S. Atty Terree Bowers.... (See ltr for complete text) (En Banc Panel) [93-50057, 93-50031] (gva) [93-50031 93-50057]
- 9/2/94 87 Filed original and 20 copies Appellees Aaron Hampton and Robert Rozelle en banc supplemental brief of 15 pages, served on 8/31/94 (en banc panel) [93-50031] (ec) [93-50031]

- 9/2/94 88 Filed original and 20 copies Appellee Shelton Auntwan Martin en banc supplemental brief of 15 pages, served on 8/31/94 (en banc panel) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 9/6/94 89 Filed original and 20 copies Appellant USA en banc supplemental brief of 15 pages (EN BANC COURT via overnight mail); served on 8/31/94 [93-50031, 93-50057] (sa) [93-50031 93-50057]
- 9/12/94 90 Filed notice of change of counsel for appellee Freddie Mack; joinder in brief of appellee Martin. (en banc panel) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 9/12/94 92 Filed request (faxed copy) of Courtroom TV Network to operate video equipment and clerk order: (Clerk: cac) A majority of the panel of judges hearing the case disapproves coverage. Courtroom TV Network's request for coverage is denied. [2642280-1] in 93-50031, 93-50057 (Motion recvd 8/26/94) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 9/22/94 94 ARGUED AND SUBMITTED TO (EN-BANC HEARING) WALLACE, BROWNING, SCHROEDER, FLETCHER, DW NELSON, CANBY, REINHARDT, LEAVY, RYMER, TG NELSON, KLEINFELD. [93-50031, 93-50057] (lu) [93-50031 93-50057]
- 9/22/94 95 Received USA in 93-50031, USA in 93-50057 additional citations, served on 9/22/94. (served panel) [93-50031, 93-50057] (lu) [93-50031 93-50057]

- 1/18/95 97 Rec'd supp'l CJA voucher (#0610261-2 for \$3000.00) from counsel (Walsh) for approval of claim. [93-50031] (jr) [93-50031]
- 2/3/95 98 Supp'l CJA voucher (#0610261-2 for \$3000.00) forwarded to Commissioner (PLS) for approval. [93-50031] (jr) [93-50031]
- 2/3/95 99 Received supplemental CJA voucher (Voucher #0610261-3 \$1852.50) from counsel for approval of claim. [93-50031] (Voucher #0606608-2, for atty. Lannen for aple Hampton) -mlm- (ah) [93-50031]
- 2/7/95 100 Supp'l CJA voucher (#0610261-2 for \$3000.00) rec'd from Commissioner (PLS), approved. Sent to Administrative Judge (SR) for approval of excess. (jr) [93-50031]
- 2/16/95 101 Rec'd supp'l CJA voucher (#0610261-2 for \$3000.00) from Administrative Judge approving excess claim. (jr) [93-50031]
- 2/24/95 103 Supplemental CJA voucher (Voucher #0606608-2 \$1852.50 Atty Lannen for aple Hampton) forwarded to panel judge PS for approval. [93-50031] (mlm) [93-50031]
- 2/24/95 104 Processed CJA voucher (Voucher #0610261-2 \$3000) for counsel (Joseph Francis Walsh in 93-50031) [93-50031] (mlm) [93-50031]
- 2/28/95 109 Suppl. CJA voucher (Voucher #0606608-2 \$1852.50) rec'd from Commissioner PS, approved. Sent to Administrative Judge SR for approval of excess. (mlm) [93-50031]

- 3/2/95 106 FIELD OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Heard en banc; J. C. WALLACE, concurring; James R. BROWNING; Mary M. Schroeder; Betty B. FLETCHER; Dorothy W. NELSON; William C. CANBY; Stephen R. REINHARDT; Edward LEAVY, dissenting; Pamela A. RYMER, dissenting; Thomas G. NELSON, dissenting; Andrew J. KLEINFELD, dissenting.) FILED AND ENTERED JUDGMENT. [93-50031, 93-50057] (sa) [93-50031 93-50057]
- 3/14/95 108 Received supplemental CJA voucher (Voucher #0606608-2 \$1852.50) from Administrative Judge approving excess claim. (mlm) [93-50031]
- 3/16/95 110 Processed CJA voucher (Voucher #0606608-2 \$1852.50) for counsel (Timothy C. Lannen in 93-50031) [93-50031] (mlm) [93-50031]
- 3/20/95 111 Filed Appellant USA motion to stay the mandate pending application for writ of cert.... (SR via fax) [93-50031, 93-50057] served on 3/17/95 [2755516] [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 3/21/95 112 Filed Appellee Shelton Auntwan Martin Notice of decision not to file written opposition to aplt's motion for stay of mandate. in 93-50031, 93-50057 served on 3/20/95 (SR via fax) [93-50031, 93-50057] (ec) [93-50031 93-50057]

- 3/24/95 114 Filed order (Stephen R. REINHARDT,): Appellant's motion to stay the mandate for 30 days from the date it would otherwise issue is granted. [2755516-1] in 93-50031, [93-50031, 93-50057] (wp) [93-50031 93-50057]
- 4/21/95 115 Filed Appellant USA motion for further stay of the mandate.... (SR) [93-50031] served on 4/21/95 [2776494] [93-50031] (ec) [93-50031]
- 4/28/95 116 Filed order (Stephen R. REINHARDT,): the plaintiff-appellant's request to stay the mandate until May 31, 1995 is granted. [2776494-1] in 93-50031 [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 5/25/95 117 Rec'd letter dated 5/19/95 from Supreme Court re: order filed today granting ext of time to and including 6/30/95 in which to file cert. petition. [93-50031, 93-50057] (jr) [93-50031 93-50057]
- 5/26/95 118 Filed Appellant USA motion for further stay the mandate pending application for writ of cert... (SR via Fed. Ex) [93-50031, 93-50057] served on 5/25/95 [2797529] [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 5/30/95 119 Filed order (Stephen R. REINHARDT) the pltf-aplt's request to stay the mandate untii 6/30/95 is GRANTED. [2797529-1] (PHONED OUT: 3:15 pm) [93-50031 93-50057] (rc) [93-50031 93-50057]

- 5/31/95 120 Filed aple Christopher Lee Armstrong motion to expedite issuance of the mandate with attached memo of pts & auth, construed as motion for reconsideration (REINHARDT) [93-50031, 93-50057] served on 5/25/95 [2799904] (sa) [93-50031 93-50057]
- 6/6/95 121 Filed order (Stephen R. REINHARDT,) Appellee Armstrong's motion to expedite issuance of the mandate is denied. [93-50031, 93-50057] (hh) [93-50031 93-50057]
- 6/23/95 122 Recvd courtesy copy of US application to S.Ct. for extension of time to 7/28/95 to file petition for cert. [casefile] [93-50031, 93-50057] (mlm) [93-50031 93-50057]
- 6/27/95 123 Filed aplt's mtn for further stay of the mandate pending application for a petition for a writ of certiorari; declaration of Mariam A. Krinsky. (FAXED TO: SR) served on 6/26/95 [2816199] [93-50031, 93-50057] (rc) [93-50031 93-50057]
- 6/30/95 124 Received S.Ct. letter dated 6/21/95 re: granted extension of time to file petition for cert. until 7/28/95. [93-50031, 93-50057] (mlm) [93-50031 93-50057]
- 7/3/95 125 Filed order (Stephen R. REINHARDT): Plaintiff-appellant's motion to stay the mandate until 8/7/95 pending the filing of a petition for writ of cert is hereby granted. In the event that the petition for cert is timely filed, the stay shall continue until final disp'n by the Sup. Ct. [93-50031, 93-50057] (sa) [93-50031 93-50057]

- 8/17/95 129 Copy of letter received from Barbara E. O'Connor, DFPD dtd 8/15/95, addressed to William K. Sutter, Clk, Spremet Ct of The United States re: on behalf of respondents Robert Rozelle, Aaron Hampton and Shelton Auntwan Martin, I wish to request a 30 day ext of time within which to file a brief in opposition to the petition for a writ of certiorari filed by the Solicitor General. Csl for all three of these respondents will be filing a separate briefs in opposition to petition.... (For Complete Text See Ltr) (CASEFILE) [93-50031] (rc) [93-50031]
- 9/25/95 130 Rec'd supp'l CJA voucher (#0610261-2 for \$2700.00) from counsel (Walsh) for approval of claim. [93-50031] (jr) [93-50031]
- 10/3/95 131 Supplemental CJA voucher (Voucher #0610261-3 \$2700) forwarded to commissioner for approval. [93-50031] (crw) [93-50031]
- 10/5/95 132 Suppl. CJA voucher (Voucher #0610261-3 \$2700) rec'd from commissioner, approved. Sent to Administrative Judge SR for approval of excess. (crw) [93-50031]
- 10/23/95 133 Rec'd supp'l CJA voucher (#0606608-3 for \$2422.50) from counsel (Lannen) for approval of claim. [93-50031] (jr) [93-50031]
- 10/25/95 134 Received supplemental CJA voucher (Voucher #0610261-3 \$2700) from Administrative Judge approving excess claim. (crw) [93-50031]

- 10/25/95 135 Supplemental CJA voucher (Voucher #0606608-3 \$2422.50) forwarded to commissioner for approval. [93-50031] (crw) [93-50031]
- 10/30/95 136 Processed CJA voucher (Voucher #0610261-3 \$2700.) for counsel (Joseph Francis Walsh in 93-50031) [93-50031] (ah) [93-50031]
- 11/2/95 142 Received letter from the Supreme Court dated 10/30/95 re: cert granted. [93-50031, 93-50057] (ah) [93-50031 93-50057]
- 11/9/95 139 Rcvd copy of respondents opposition to cert petition. [93-50031, 93-50057] (crw) [93-50031 93-50057]
- 11/9/95 140 Rcvd copy of ptnr USA's cert petition [93-50031, 93-50057] (crw) [93-50031 93-50057]
- 11/13/95 141 Suppl. CJA voucher (Voucher #0606608-3 \$2422.50) rec'd from commissioner, approved. Sent to Administrative Judge SR for approval of excess. (crw) [93-50031]

GENERAL DOCKET FOR
NINTH CIRCUIT COURT OF APPEALS

Court of Appeals Docket
No. 93-50057

USA

v.

ARMSTRONG

APPEAL FROM: CENTRAL DISTRICT OF CALIFORNIA,
LOS ANGELES

Filed: 2/8/93
Nsuit: 0

- 2/8/93 1 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C. on 1/19/93; setting schedule as follows: transcript shall be ordered by 2/11/93 for USA; transcript shall be filed by 3/15/93; appellants' briefs, excerpts due by 4/22/93 for USA; appellees' brief due 5/24/93 for Christopher Lee Armstrong; appellants' reply brief due by 6/7/93 for USA. (RT required: y) (Sentence imp) [93-50057] (rmw) [93-50057]
- 2/16/93 2 Filed order (Deputy Clerk: mg) the court is in receipt of the 4 Govt's motions to consolidate 93-50031 and 93-50057 and to expedite the appeals. The motions are granted. Appeals 93-50031 and 93-50057 are consolidated. The expedited briefing schedule is as follows: opening brief due Mar 1, 1993; aple's brief due Mar 31, 1993. Optional reply brief due 14 days from service ans brief. Court records do not currently reflect that DC has issued the COR. Aplt shall monitor the issuance of the certificate . . . These appeals shall be placed on the next available calendar after the filing of the ans brief. (Motion recvd 2/9/93) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 3/3/93 3 Filed original and 15 copies Appellant USA in 93-50031, Appellant USA in 93-50057 opening brief (Informal: n) 37 pages and five excerpts of record in 1 volume; served on 3/1/93 [93-50031, 93-50057] (ec) [93-50031 93-50057]

- 3/29/93 4 14 day oral extension by phone of time to file appellee's brief denied — case expedited. [93-50031, 93-50057] (ra) [93-50031 93-50057]
- 4/2/93 5 Filed original and 15 copies Appellee Shelton Auntwan Martin in 93-50031 brief, 25 pages, 5 suppl. Exc.: served on 3/31/93 minor defcy: no Statement of Rel. Cases Notified counsel. [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 4/5/93 6 Filed motion of defendant Freddie Mack for joinder in co-defendant Shelton Cuntuan Martin's ans brief and deputy clerk order: (Deputy Clerk: cg) granting motion & order [2327428-1] in 93-50031, 93-50057 (Motion recvd 3/31/93) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 4/8/93 7 Filed original and 15 copies appellees Aaron Hampton, Robert Rozelle 14 pages brief, ; served on 3/31/93 [93-50031] (ec) [93-50031]
- 4/12/93 9 Received Appellee Shelton Auntwan Martin in 93-50031 satisfaction of (minor) brief deficiency. (stmt. of related cases) [93-50031, 93-50057] (jlc) [93-50031 93-50057]
- 4/15/93 8 Filed motion and order: (Deputy Clerk: cag) granting motion of Christopher Lee Armstrong's to join in the ans brief of Co-Def Shelton C. Martin is granted. The optional reply brief shall be due 14 days from the date of this order. in 93-50057 (motion recvd 4/12/93) [93-50031, 93-50057] (tsp) [93-50031 93-50057]

- 4/19/93 10 Filed original and 15 copies USA in 93-50031, USA in 93-50057 reply brief, (Informal: n) 12 pages; served on 4/15/93 [93-50031, 93-50057] (ft) [93-50031 93-50057]
- 4/21/93 11 Filed: (Deputy Clerk: cag) denying motion & order to file late brief. By way of the 4/15/93 clk's order the due date for the reply brief was changed to 4/29/93. Provided the brief was served by the date, the reply brief shall be filed upon receipt. It appearing that briefing is complete, this appeal is deemed ready for calendaring. [2337931-1] in 93-50031, 93-50057 (Motion recvd 4/19/93) [93-50031, 93-50057] (tsp) [93-50031 93-50057]
- 4/26/93 13 Filed record on appeal in 13 Vols. (total): 4 Clerks Rec 9 RTs (orig) [93-50031, 93-50057] [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 4/27/93 14 Calendar check performed [93-50031, 93-50057] (aw) [93-50031 93-50057]
- 4/30/93 15 Calendar materials being prepared. [93-50031, 93-50057] [93-50031, 93-50057] (aw) [93-50031 93-50057]
- 5/5/93 16 CALENDARED: Pasadena 1:30 pm 7/12/93 Courtroom 1 [93-50031, 93-50057] (th) [93-50031 93-50057]
- 5/28/93 17 Filed Christopher Lee Armstrong Notice to join in oral argument at July 12, 1993 hearing by co-cnsl Barbara O'Conner. Cnsl David R. Reed will not be present at the oral argument . . . (Panel) [93-50057, 93-50031] [2361602] note: no proof of service (ec) [93-50031 93-50057]

- 7/12/93 18 ARGUED AND SUBMITTED TO Harlington Wood, Stephen R. REINHARDT, Pamela A. RYMER [93-50031, 93-50057] (jhc) [93-50031 93-50057]
- 8/25/93 20 Filed certificate of record on appeal RT filed in DC 4/8/93 [93-50031] (dr) [93-50031]
- 8/25/93 21 Filed certificate of record on appeal RT filed in DC 4/8/93 [93-50057] (dr) [93-50057]
- 1/21/94 23 FILED OPINION: REVERSED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Harlington Wood, author; Stephen R. REINHARDT, dissenting; Pamela A. RYMER.) FILED AND ENTERED JUDGMENT. [93-50031, 93-50057] (ck) [93-50031 93-50057]
- 2/8/94 24 [2512726] Filed original and 40 copies Appellee Shelton Auntwan Martin petition for rehearing with suggestion for rehearing en banc 12 p. pages, served on 2/4/94 (panel; active judges) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 2/10/94 25 Filed Aple Armstrong mtn to join in petition for rehearing of Robert Rozelle; served on 2/4/94 (Panel) [2516064-1] (gva) [93-50031 93-50057]

- 3/7/94 27 Received from Barbara O'Connor, Supr. Trial Atty., FPD, letter dated Mar 3, 1994 with a copy of USA v. Clary Finding and Conclusions of Law as suppl authority in support of petition for rehearing en banc (one copy only) note: notified cnsl to submit 39 addl copies (by fax) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 3/9/94 28 Received from Barbara E. O'Connor, Supvr. Trial Atty., letter dated Mar 67, 1994, w/39 addl copies of suppl. authority in support of Petition for Rehearing, with Suggestion for Rehearing en banc filed on behalf of defendant Martin (panel; active judges) citations, served on 3/3/94 [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 4/20/94 29 Filed order (Harlington Wood, Stephen R. REINHARDT, Pamela A. RYMER,): The opinion and dissent filed Jan 21, 1994, slip. op. 599 and appearing at 14 F.3d 1387 (9th Cir. 1944) are withdrawn. A new opinion and dissent are filed in their place, and the petitions for rehearing and suggestion for rehearing en banc are dismissed as moot and without prejudice. [2512726-1] in 93-50031, 93-50057 [2513347-1] [93-50031, 93-50057] (ec) [93-50031 93-50057]

- 4/20/94 30 FILED OPINION: REVERSED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Harlington Wood, author; Stephen R. REINHARDT, dissenting; Pamela A. RYMER.) FILED AND ENTERED JUDGMENT. [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 5/5/94 31 Filed order (Harlington Wood, Stephen R. REINHARDT, Pamela A. RYMER.): the issuance of the mandate shall be stayed pending further notice from the panel. [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 5/6/94 32 [2566004] Filed original and 40 copies Appellee Shelton Auntwan Martin in 93-50031 petition for rehearing with suggestion for rehearing en banc 14 p. pages, served on 5/4/94 (panel; active judges) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 5/25/94 33 Filed order (Harlington WOOD, Jr., Stephen R. REINHARDT, Pamela R. RYMER.): the appt shall file a response to the petition for rehearing and suggestion for rehearing en banc not exceeding 15 pages in length setting forth its position on whether this case should be heard en banc. Forty copies of each brief shall be filed within 21 days from the date of this order. [93-50031, 93-50057] (ec) [93-50031 93-50057]

- 6/17/94 34 Filed Appellant's USA response to petition for en banc rehearing [2566004-1] in 93-50031, 93-50057 served on 6/15/94 (panel; active judges) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 8/1/94 37 Filed order FOR PUBLICATION (J. C. WALLACE) upon the vote of a majority of nonrecused regular active judges of this ct, it is ordered that this case be reheard by the en banc court pursuant to Cir. Rule 35-3. [93-50031, 93-50057] (rc) [93-50031 93-50057]
- 8/3/94 38 Filed order (J.C. WALLACE) oral argument in the above case shall be reheard en banc in Pasadena on Sept. 22, 1994, at 1: 30 pm. The parties shall forward twenty (20) copies of their original briefs and excerpts of record on or before 8/17/94. (PHONED OUT: 4:00 pm.) [93-50031, 93-50057] (rc) [93-50031 93-50057]
- 8/10/94 40 Filed order (J. C. WALLACE.): Within 21 days from the date of this order, the parties shall file simultaneous en banc briefs not to exceed fifteen pages. [93-50031, 93-50057] note: send briefs to panel by Fed. Express or overnight mail. (ec) [93-50031 93-50057]
- 8/12/94 41 Received orig. 20 copies Appellees Aaron Hampton, Robert Rozelle in 93-50031's brief of 14 pages; served on 3/31/93 (prev. filed April 2, 1993) note: submitted pursuant to court's order of Aug 3, 1994. -en banc panel- [93-50031] (ec) [93-50031]

- 8/15/94 42 Received 20 addl copies Appellant USA opening brief, 37 pages and Excerpts of Record (originally filed Mar 3, 1993), Served on 3/1/93 (en banc panel) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 8/15/94 43 Received 20 addl copies USA reply brief, 12 pages (originally filed April 19, 1993) -en banc panel- [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 8/15/94 44 Received 20 addl copies appellee Shelton Auntwan Martin's brief of 25 pages (orig. filed April 2, 1993) -en banc panel- [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 8/15/94 45 [2626953] Received 20 addl copies Appellee Shelton Auntwan Martin petition for rehearing with suggestion for rehearing en banc (originally filed May 6, 1994 -en banc panel-, (ec) [93-50031 93-50057]
- 8/15/94 46 Received 20 addl copies Appellant USA response to petition for rehearing and suggestion for rehearing en banc, (originally filed June 17, 1994) served on 6/15/94. -en banc panel- [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 8/18/94 47 Received 20 addl copies Appellee's Shelton Auntwan Martin supplemental excerpts of record on appeal in 1 vol. (originally filed 4/2/93) -en banc panel- (ec) [93-50031 93-50057]

- 8/18/94 48 Received ltr dated 8/15/94 from Aple Armstrong re: I hereby transmit this complaint and request that you appoint an independent csl, pursuant to 28 U.S.C. 591, to investigate the misconduct of U.S. Atty Terree Bowers. . . . (See ltr for complete text) (En Banc Panel) [93-50057, 93-50031] (gva) [93-50031 93-50057]
- 9/2/94 49 Filed original and 20 copies Appellees Aaron Hampton and Robert Rozelle en banc supplemental brief of 15 pages, served on 8/31/94 (en banc panel) [93-50031] (ec) [93-50031]
- 9/2/94 50 Filed original and 20 copies Appellee Shelton Auntwan Martin en banc supplemental brief of 15 pages, served on 8/31/94 (en banc panel) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 9/6/94 51 Filed original and 20 copies Appellant USA en banc supplemental brief of 15 pages (EN BANC COURT via overnight mail); served on 8/31/94 [93-50031, 93-50057] (sa) [93-50031 93-50057]
- 9/12/94 52 Filed notice of change of counsel for appellee Freddie Mack; joinder in brief of appellee Martin. (en banc panel) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 9/12/94 53 Filed joinder of appellee Armstrong in appellee Martin's en banc brief, served 9/9/94 (en banc panel) [93-50057] (ec) [93-50057]

- 9/12/94 54 Filed request (faxed copy) of Courtroom TV Network to operate video equipment and clerk order: (Clerk: cac) A majority of the panel of judges hearing the case disapproves coverage. Courtroom TV Network's request for coverage is denied. [2642280-1] in 93-50031, 93-50057 (Motion recvd 8/26/94) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 9/22/94 55 ARGUED AND SUBMITTED TO (EN-BANC HEARING) WALLACE, BROWNING, SCHROEDER, FLETCHER, DW NELSON, CANBY, REINHARDT, LEAVY, RYMER, TG NELSON, KLEINFELD. [93-50031, 93-50057] (lu) [93-50031 93-50057]
- 9/22/94 56 Received USA in 93-50031, USA in 93-50057 additional citations, served on 9/22/94. (served panel) [93-50031, 93-50057] (lu) [93-50031 93-50057]
- 3/2/95 58 FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Heard en banc; J. C. WALLACE, concurring; James R. BROWNING; Mary M. SCHROEDER; Betty B. FLETCHER; Dorothy W. NELSON; William C. CANBY; Stephen R. REINHARDT; Edward LEAVY, dissenting; Pamela A. RYMER, dissenting; Thomas G. NELSON, dissenting; Andrew J. KLEINFELD, dissenting.) FILED AND ENTERED JUDGMENT. [9E-50031, 93-50057] (sa) [93-50031 93-50057]

- 3/20/95 60 Filed Appellant USA motion to stay the mandate pending application for writ of cert. . . . (SR via fax) [93-50031, 93-50057] served on 3/17/95 [2755516] [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 3/21/95 61 Filed Appellee Shelton Auntwan Martin Notice of decision not to file written opposition to aplt's motion for stay of mandate. in 93-50031, 93-50057 served on 3/20/95 (SR via fax) [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 3/24/95 62 Filed order (Stephen R. REINHARDT,): Appellant's motion to stay the mandate for 30 days from the date it would otherwise issue is granted. [2755516-1] in 93-50031, [93-50031, 93-50057] (wp) [93-50031 93-50057]
- 4/21/95 63 Filed Appellant USA motion for further stay of the mandate. . . . (SR) [93-50031] served on 4/21/95 [2776494] [93-50031] (ec) [93-50031]
- 4/28/95 64 Filed order (Stephen R. REINHARDT,): the plaintiff-appellant's request to stay the mandate until May 31, 1995 is granted. [2776494-1] in 93-50031 [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 5/25/95 65 Rec'd letter dated 5/19/95 from Supreme Court re: order filed today granting ext of time to and including 6/30/95 in which to file cert. petition. [93-50031, 93-50057] (jr) [93-50031 93-50057]

- 5/26/95 66 Filed Appellant USA motion for further stay the mandate pending application for writ of cert . . . (SR via Fed. Ex) [93-50031, 93-50057] served on 5/25/95 [2797529] [93-50031, 93-50057] (ec) [93-50031 93-50057]
- 5/30/95 68 Filed order (Stephen R. REINHARDT) the pltf-aplt's request to stay the mandate until 6/30/95 is GRANTED. [2797529-1] (PHONED OUT: 3:15 pm) [93-50031, 93-50057] (rc) [93-50031 93-50057]
- 5/31/95 69 Filed aple Christopher Lee Armstrong motion to expedite issuance of the mandate with attached memo of pts & auth, construed as motion for reconsideration (REINHARDT) [93-50031, 93-50057] served on 5/25/95 [2799904] (sa) [93-50031 93-50057]
- 6/6/95 70 Filed order (Stephen R. REINHARDT,) Appellee Armstrong's motion to expedite issuance of the mandate is denied. [93-50031, 93-50057] (hh) [93-50031 93-50057]
- 6/23/95 71 Recvd courtesy copy of US application to S.Ct. for extension of time to 7/28/95 to file petition for cert. [casefile] [93-50031, 93-50057] (mlm) [93-50031 93-50057]
- 6/27/95 72 Filed aplt's mtn for further stay of the mandate pending application for a petition for a writ of certiorari; declaration of Miriam A. Krinsky. (FAXED TO: SR) served on 6/26/95 [2816199] [93-50031, 93-50057] (rc) [93-50031 93-50057]

- 6/30/95 73 Received S.Ct. letter dated 6/21/95 re: granted extension of time to file petition for cert. until 7/28/95. [93-50031, 93-50057] (mlm) [93-50031 93-50057]
- 7/3/95 74 Filed order (Stephen R. REINHARDT): Plaintiff-appellant's motion to stay the mandate until 8/7/95 pending the filing of a petition for writ of cert is hereby granted. In the event that the petition for cert is timely filed, the stay shall continue until final disp'n by the Sup. Ct. [93-50031, 93-50057] (sa) [93-50031 93-50057]
- 11/2/95 77 Received letter from the Supreme Court dated 10/30/95 re: cert granted. [93-50031, 93-50057] (ah) [93-50031 93-50057]
- 11/9/95 75 Rcvd copy of respondents opposition to cert petition. [93-50031, 93-50057] (crw) [93-50031 93-50057]
- 11/9/95 76 Rcvd copy of ptnr USA's cert petition [93-50031, 93-50057] (crw) [93-50031 93-50057]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
FEBRUARY 1992 GRAND JURY

No. CR92-336

UNITED STATES OF AMERICA, *Plaintiff,*

v.

CHRISTOPHER LEE ARMSTRONG, ROBERT ROZELLE,
AARON HAMPTON, FREDDIE MACK, SHELTON AUNTWAN
MARTIN, AKA "PSYCHO," *Defendants.*

INDICTMENT

[21 U.S.C. § 846: Conspiracy; 21 U.S.C. § 841(a)(1):
Possession with Intent to Distribute and Distribution of
Cocaine Base; 18 U.S.C. § 924(c): Using and Carrying a
Firearm During a Drug Trafficking Crime]

The Grand Jury charges:

COUNT ONE
[21 U.S.C. § 846]

I. *OBJECTS OF THE CONSPIRACY*

Beginning on a date unknown to the Grand Jury and continuing to on or about April 8, 1992, in Los Angeles County, within the Central District of California, defendants CHRISTOPHER LEE ARMSTRONG, ROBERT ROZELLE, AARON HAMPTON, FREDDIE MACK, and SHELTON AUNTWAN MARTIN, aka "Psycho," and

others known and unknown to the Grand Jury, knowingly and willfully conspired and agreed with each other to commit the following offenses against the United States, in violation of title 21, United States Code, Section 846:

1. To knowingly and intentionally possess with intent to distribute an amount in excess of 50 grams of cocaine base, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1); and

2. To knowingly and intentionally distribute an amount in excess of 50 grams of cocaine base, a Schedule II narcotic drug controlled substance, in violation of title 21, United States Code, Section 841(a)(1).

II. *MEANS BY WHICH THE OBJECTS OF THE CONSPIRACY WERE TO BE ACCOMPLISHED*

The objects of the conspiracy were to be accomplished, in substance, as follows:

1. Defendants CHRISTOPHER LEE ARMSTRONG, ROBERT ROZELLE, and SHELTON AUNTWAN MARTIN, aka "Psycho," and others known and unknown to the Grand Jury, would rent and occupy Room 203 of the La Mirage Motel, located in Los Angeles, California ("Room 203"), for the purpose of operating a "crack house," that is, a facility for the storage and sale of cocaine base.

2. In connection with the distribution of cocaine base from Room 203, defendant CHRISTOPHER LEE ARMSTRONG would negotiate the sale of cocaine base with prospective customers of the drugs and would direct the customers either to Room 203 or to an off-site location for the purpose of delivering the drugs and receiving payment.

3. Defendant CHRISTOPHER LEE ARMSTRONG would either sell cocaine base to the customers himself or

would provide the drugs to various co-conspirators who, in turn, would deliver the drugs to customers.

4. Defendant ROBERT ROZELLE would supply customers with cocaine base from Room 203.

5. Defendant CHRISTOPHER LEE ARMSTRONG periodically would resupply ROBERT ROZELLE at Room 203 with cocaine base.

6. Defendant SHELTON AUNTWAN MARTIN, aka "Psycho," would act as an armed guard at Room 203 during the sale of cocaine base and would assist with the distribution of the drugs.

7. Defendants AARON HAMPTON and FREDDIE MACK would deliver cocaine base to customers at off-site locations.

III. OVERT ACTS

In furtherance of the conspiracy and to accomplish the objects of the conspiracy, the defendants, and others known and unknown to the Grand Jury, committed various overt acts within the Central District of California, including but not limited to the following:

1. On or about February 13, 1992, defendant CHRISTOPHER LEE ARMSTRONG negotiated by telephone with a confidential informant (CI) for the delivery, at a Burger King restaurant in Hawthorne, of 1/2 ounce of cocaine base.

2. On or about February 13, 1992, defendants AARON HAMPTON and FREDDIE MACK met with a CI at a Burger King restaurant in Hawthorne and delivered approximately 6.71 grams of cocaine base.

3. On or about March 11, 1992, defendant CHRISTOPHER LEE ARMSTRONG negotiated by telephone with a CI for the delivery, in Room 203, of cocaine base.

4. On or about March 11, 1992, defendant ROBERT ROZELLE sold a CI approximately 1.86 grams of cocaine base in Room 203.

5. On or about March 11, 1992, defendant SHELTON AUNTWAN MARTIN, aka "Psycho," in the presence of defendant ROBERT ROZELLE, possessed a .357 magnum handgun in Room 203 and acted as a guard during a sale of cocaine base.

6. On or about March 13, 1992, defendant CHRISTOPHER LEE ARMSTRONG negotiated by telephone with a CI for delivery, in Room 203, of cocaine base.

7. On or about March 13, 1992, defendants ROBERT ROZELLE and SHELTON AUNTWAN MARTIN, aka "Psycho," met with a CI in Room 203 and showed the CI a .357 handgun and a .38 caliber revolver.

8. On or about March 13, 1992, defendants CHRISTOPHER LEE ARMSTRONG, ROBERT ROZELLE, and SHELTON AUNTWAN MARTIN, aka "Psycho," sold a CI approximately 1.85 grams of cocaine base in Room 203.

9. On or about March 16, 1992, defendant CHRISTOPHER LEE ARMSTRONG negotiated by telephone with a CI for the delivery, in Room 203, of cocaine base.

10. On or about March 16, 1992, defendants CHRISTOPHER LEE ARMSTRONG, ROBERT ROZELLE, and SHELTON AUNTWAN MARTIN, aka "Psycho," sold a CI approximately 28 grams of cocaine base in Room 203.

11. On or about March 23, 1992, defendant CHRISTOPHER LEE ARMSTRONG negotiated by telephone with a CI for the sale of one pound of cocaine base for \$8,500.

12. On or about March 24, 1992, defendant CHRISTOPHER LEE ARMSTRONG negotiated by telephone with a CI for the delivery, at a Boy's Market in Inglewood, of cocaine base.

13. On or about March 24, 1992, defendants CHRISTOPHER LEE ARMSTRONG, AARON HAMPTON and FREDDIE MACK delivered approximately 3.5 grams of cocaine base to a CI at a Boy's Market in Inglewood.

14. On or about March 27, 1992, defendant CHRISTOPHER LEE ARMSTRONG negotiated by telephone with a

CI for the delivery, at a Taco Bell in Hawthorne, of one ounce of cocaine base.

15. On or about March 27, 1992, defendant AARON HAMPTON delivered approximately 27 grams of cocaine base to a CI at a Taco Bell in Hawthorne.

16. On or about April 6, 1992, defendant CHRISTOPHER LEE ARMSTRONG negotiated with a CI for the delivery, at a Builder's Emporium in Inglewood, of approximately two ounces of cocaine base.

17. On or about April 6, 1992, defendants CHRISTOPHER LEE ARMSTRONG and AARON HAMPTON delivered approximately 55.38 grams of cocaine base to a CI at a Builder's Emporium in Inglewood.

18. On or about April 8, 1992, defendants CHRISTOPHER LEE ARMSTRONG and AARON HAMPTON possessed, in Room 203, one Ruger 9 millimeter semi-automatic pistol and approximately 9.29 grams of cocaine base.

COUNT TWO

[21 U.S.C. § 841(a)(1)]

On or about February 13, 1992, defendants CHRISTOPHER LEE ARMSTRONG, AARON HAMPTON and FREDDIE MACK knowingly and intentionally distributed approximately 6.71 grams of a mixture or substance containing a detectable amount of cocaine base, a Schedule II narcotic drug controlled substance.

COUNT THREE

[18 U.S.C. § 924(c)]

On or about March 11, 1992, defendants CHRISTOPHER LEE ARMSTRONG, ROBERT ROZELLE, and SHELTON AUNTWAN MARTIN, aka "Psycho," knowingly used and carried a firearm during and in relation to a

drug trafficking crime, namely, distribution of 1.86 grams of cocaine base, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT FOUR

[18 U.S.C. § 924(c)]

On or about March 13, 1992, defendants CHRISTOPHER LEE ARMSTRONG, ROBERT ROZELLE, and SHELTON AUNTWAN MARTIN, aka "Psycho," knowingly used and carried a firearm during and in relation to a drug trafficking crime, namely, distribution of 1.85 grams of cocaine base, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT FIVE

[21 U.S.C. § 841(a)(1)]

On or about March 16, 1992, defendants CHRISTOPHER LEE ARMSTRONG, ROBERT ROZELLE, and SHELTON AUNTWAN MARTIN, aka "Psycho," knowingly and intentionally distributed approximately 28 grams of a mixture or substance containing a detectable amount of cocaine base, a Schedule II narcotic drug controlled substance.

COUNT SIX

[21 U.S.C. § 841(a)(1)]

On or about March 27, 1992, defendants CHRISTOPHER LEE ARMSTRONG and AARON HAMPTON knowingly and intentionally distributed approximately 27 grams of a mixture or substance containing a detectable amount of cocaine base, a Schedule II narcotic drug controlled substance.

COUNT SEVEN
[21 U.S.C. § 841(a)(1)]

On or about April 6, 1992, defendants CHRISTOPHER LEE ARMSTRONG and AARON HAMPTON knowingly and intentionally distributed approximately 55.38 grams of a mixture or substance containing a detectable amount of cocaine base, a Schedule II narcotic drug controlled substance.

COUNT EIGHT
[21 U.S.C. § 841(a)(1)]

On or about April 8, 1992, defendants CHRISTOPHER LEE ARMSTRONG and AARON HAMPTON knowingly and intentionally possessed with intent to distribute approximately 9.29 grams of a mixture or substance containing a detectable amount of cocaine base, a Schedule II narcotic drug controlled substance.

COUNT NINE
[18 U.S.C. § 924(c)]

On or about April 8, 1992, defendants CHRISTOPHER LEE ARMSTRONG and AARON HAMPTON knowingly used and carried a firearm during and in relation to a drug trafficking crime, namely, possession with intent to distribute cocaine base, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL

Foreperson

LOURDES G. BAIRD
United States Attorney

ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

DAVID C. SCHEPER
Assistant United States Attorney
Chief, Criminal Complaints

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR92-336-CBM

UNITED STATES OF AMERICA, *Plaintiff,*

v.

CHRISTOPHER LEE ARMSTRONG, ROBERT ROZELLE,
AARON HAMPTON, FREDDIE MACK, SHELTON AUNTWAN
MARTIN, *Defendants.*

NOTICE OF MOTION; MOTION FOR DISCOVERY
AND/OR DISMISSAL OF INDICTMENT FOR
SELECTIVE PROSECUTION; MEMORANDUM OF
POINTS AND AUTHORITIES; DECLARATION

Hearing Date: 8-17-92
Hearing Time: 1:30 p.m.

TO: UNITED STATES ATTORNEY LOURDES G.
BAIRD AND ASSISTANT UNITED STATES AT-
TORNEY LAWRENCE H. CHO:

PLEASE TAKE NOTICE that on August 17, 1992 at
1:30 p.m., or as soon thereafter as counsel may be heard,
in the courtroom of the Honorable Consuelo B. Marshall,
United States District Judge, defendant, SHELTON MAR-
TIN, will bring on for hearing the following motion:

DECLARATION OF MARLA BELLER

I, Marla Beller, hereby state and declare as follows:

1. I am employed as a Paralegal Specialist by the
Federal Public Defender in the Central District of
California.

2. Paralegal Specialists Damone Schraier, James Sim-
mons, and myself have reviewed all cases closed by the
Office of the Federal Public defender during the year 1991,
which alleged violations of 21 U.S.C. § 846 and/or 21
U.S.C. § 841. Of those cases, I have prepared a list of all
those involving cocaine base, excluding only out-of-district
cases and those in which counsel was retained prior to
post-indictment arraignment (based on whether or not there
was a copy of the indictment in our file).

3. Attached hereto and incorporated by reference herein
is a copy of a chart evidencing the results of the study of
those cases including the case name, case number, the
attorney assigned to the case, whether cocaine base alone
or both cocaine base and cocaine powder were involved,
and the race of the defendant. The information regarding
the type of cocaine was obtained either from the
indictment or through an interview of the Deputy Federal
Public Defender assigned to represent the defendant. The
information regarding the race of the defendant was
obtained either from the presentence report or through an
interview of the Deputy Federal Public Defender assigned
to represent the defendant.

4. Of 24 defendants charged with cocaine base offense,
all—or 100%—were black.

I declare under penalty of perjury that the foregoing is
true and correct to the best of my knowledge.

MARLA BELLER
Paralegal Specialist

DATED: July 17, 1992

SELECTIVE PROSECUTION TAB

1/16/92
PAGE 1

NAME * CASE NUMBER * ATTY	TYPE	RACE
AMOS, DERRICK D. * CR 91-392 * DE	COCAINE BASE	BLACK
BRENT, ERICK * CR 90-651 * MA	COCAINE BASE	BLACK
BROWN, ANTHONY * CR 89-764 * SC	COCAINE BASE	BLACK
BURGESS, TIMOTHY * CR 90-573 * DNM	COCAINE BASE	BLACK
CHARLES, KEITH * CR 90-1432 * PA	COCAINE BASE	BLACK
CUNNINGHAM, RICK * CR 89-836 * KB	COCAINE POW/BASE	BLACK
CURRY, JOHNNIE * CR 90-1516 * KB	COCAINE BASE	BLACK
DAVIS, GOLDIE * CR 91-253 * CR	COCAINE BASE	BLACK
ETHRIDGE, ALFRED * CR 89-103 * AL	COCAINE BASE	BLACK
EVERETT, LONNIE * CR 91-117 * LM	COCAINE POW/BASE	BLACK
FLOYD, DION * CR 88-1678 * AL	COCAINE BASE	BLACK
KNIGHT, GEO. * CR 91-216 * NM	COCAINE BASE	BLACK
LAUDERDALE, Q. * CR 90-570 * DL	COCAINE BASE	BLACK
LIVINGSTON, T. * CR 90-652 * KJB	COCAINE BASE	BLACK
MARTIN, TONY * CR 91-95 * AE	COCAINE BASE	BLACK
PALMER, OSCAR * CR 90-1184 * DNM	COCAINE BASE	BLACK
POLLARD, SAJPSON * CR 89-160 * CK	COCAINE BASE	BLACK
RENFROE, BERNARD * CR 91-422 * PLA	COCAINE BASE	BLACK
STONE, TIMOTHY * CR 90-747 * RR	COCAINE BASE	BLACK
TILMON, LOMARR * CR 91-425 * NLE	COCAINE BASE	BLACK
VERRET, DEJUAN * CR 90-95 * AE	COCAINE BASE	BLACK
WILLIAMS, LONNIE * CR 88-504 * JF	COCAINE BASE	BLACK
WILLIAMS, MICHAEL * CR 90-523 * MS	COCAINE BASE	BLACK
WYCHE, DAVID * CR 90-969 * MA	COCAINE BASE	BLACK

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR92-336-CBM

UNITED STATES OF AMERICA, *Plaintiff,*

v.

CHRISTOPHER LEE ARMSTRONG, ROBERT ROZELLE,
AARON HAMPTON, FREDDIE MACK, SHELTON AUNTWAN
MARTIN, *Defendants.*GOVERNMENT'S MOTION FOR RECONSIDERATION
OF ORDER FOR DISCOVERY RE: SELECTIVE PROS-
ECUTION; MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF RALPH
LOCHRIDGE, MARK CAMPBELL; JEFFREY
COCHRAN; DAVID C. SCHEPER; LAWRENCE H.
CHO

(UNDER SEAL)

Plaintiff, United States of America, hereby applies to this Court to reconsider its order to compel discovery re selective prosecution. This motion is based upon the attached Memorandum of Points and Authorities and the attached Declarations of Ralph Lochridge, Mark Campbell, Jeffrey Cochran, David C. Scheper,

DECLARATION OF RALPH LOCHRIDGE

I, Ralph Lochridge, hereby declare as follows:

1. I am a Special Agent of the Drug Enforcement Administration (DEA) and have been so employed for the

past 21 years. I was a field agent in enforcement operations for 17 years, and have been serving as the Public Information Officer for the DEA Los Angeles Division for the past four years.

2. I have received training in and investigated over 500 cases involving almost all controlled substances and money laundering. With respect to cocaine base, in 1987 I was the case agent for the first DEA investigation launched in the Los Angeles area concerning a major crack cocaine trafficking organization.

3. As a Public Information Officer, it is my duty and responsibility to be knowledgeable about the investigations and various law enforcement efforts of the DEA worldwide. My knowledge is based upon numerous reports and publications issued by DEA, as well as my personal experience in investigating cases, speaking with active DEA enforcement agents, and attending various seminars, meetings, lectures, and conventions concerning narcotics enforcement efforts.

4. As a Public Information Officer, I am in a unique position within DEA which allows me access to all investigations throughout the Los Angeles division. All significant cases and major investigations are forwarded to my office for review and possible dissemination to the public.

5. It has been my experience and the experience of other agents that narcotics offenders as a whole cover an entire spectrum of different races, sexes, and religions. However, if one were to focus in on various types of narcotic substances, there is a distinct pattern indicating that various ethnic groups play a larger role in certain types of narcotics offenses. For example:

a. A large proportion of large scale marijuana growers are white.

b. Traditionally, a large proportion of methamphetamine labs were operated by white males that belonged to outlaw

Motorcycle gangs. However, recently there has been an upsurge of Hispanic operators from Mexico.

c. A large proportion of crystal methamphetamine (or "ice") users and distributors are of polynesian descent.

d. A large proportion of Southeast Asian heroin traffickers emanate from that region and are therefore of Asian descent.

e. A large proportion of black tar heroin traffickers and users are of Hispanic descent, while a large proportion of Chinese white heroin ("China White") traffickers are of Chinese descent.

f. A large proportion of opium offenders are of Southeast Asian descent, with a large subsection of that group originating from Laos, Thailand, and Burma.

g. A major proportion of large scale powder cocaine traffickers are of Hispanic or South American descent.

h. With respect to cocaine base (or "crack"), virtually all major crack traffickers uncovered in the Los Angeles area have been black and operate primarily in black neighborhoods.

6. It has been my training and experience that there are various reasons for some of these racial patterns, including cultural, geographical origination, and other reasons. For example, the proportionately high percentage of Chinese traffickers in "China White" heroin cases is obviously because the narcotic substance originates from that locale. Similarly, the reason so many Laotians and other Southeast Asians are involved in opium trafficking is because opium has been accepted and utilized in many of the cultures in that geographic location. The recent influx of Hispanic operators in methamphetamine cases can be traced back to the recent laws making it much more difficult to obtain the chemicals necessary to produce that substance in the United States, but is still easily obtained in Mexico. A prime example of a narcotic substance that is endemic to a specific ethnic community is black tar heroin. Black tar

heroin is manufactured in Mexico by Mexican chemists, commonly smuggled by Mexican organizations, and generally distributed by Mexican nationals and Mexican-Americans, and used almost exclusively by abusers of Mexican descent.

7. With respect to cocaine base, or crack, trafficking in the Southern California area is primarily centered in the poorer, inner-city areas of South Central Los Angeles, which has a very large black community. Moreover, a great deal of the cocaine base trade is controlled by gangs in the South Central area, such as the Crips and Bloods, whose membership is almost exclusively black. These gangs operate primarily in those areas, recruiting from and employing other members in the neighborhoods to sell to crack abusers that live in that community.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

RALPH LOCHRIDGE
Special Agent,
Drug Enforcement Administration

DATED: September 15, 1992

DECLARATION OF MARK CAMPBELL

I, Mark Campbell, hereby declare and state as follows:

1. I am currently employed as a narcotics detective with the Inglewood Police Department. The majority of the population of Inglewood is black. I have been employed as a police officer there for over ten years and have been assigned to the narcotics unit for approximately three years.

2. In my experience as a narcotics detective, I have investigated easily over five hundred narcotics cases; approximately 70% have involved crack cocaine. I have participated in the investigation and arrests of over one thousand narcotics suspects, all of whom were of various races including white, black, and hispanic, of either sex, of varying ages from juveniles to senior citizens, and of varying socioeconomic backgrounds.

3. It has never been the policy of the Inglewood Police Department to arrest or investigate cases based on race. We conduct investigations according to the crimes committed regardless of race, sex, or other physical or sociological factors.

4. With respect to crack cocaine offenders, I have participated in the arrests of over five hundred suspects, the overwhelming majority of which were black. These offenders often live in primarily black neighborhoods, and prey upon and sell to others who live in that community.

5. Of the several hundred crack cocaine investigations I have participated in, only four cases were brought federally; the remaining cases were referred to and prosecuted by the Inglewood District Attorney's Office. The overwhelming majority of crack cocaine defendants arrested by the Inglewood Police Department and prosecuted by the District Attorney's Office were black.

6. All four of the cases that were brought federally were jointly investigated with a Special Agent of the Bureau of

Alcohol, Tobacco, and Firearms who was participating in a joint task force operation to target major narcotics traffickers that utilize firearms in violation of federal law. Three out of the four cases resulted in the recovery of illegally utilized firearms and the indictment of federal firearms violations. Such was the case with the defendants in this case.

7. As in all of my investigations, I was unaware of the race of the defendants in this case. When defendant Armstrong's crack ring first came to my attention, I did not know that he or any members of his organization were black, nor did I care. I began the investigation because I was informed that he was a major distributor of cocaine base in the Inglewood area, that he utilized firearms for protection of the narcotics trafficking, and that he often supplied dangerous and violent gang members in the area.

8. I requested the assistance of Bureau of Alcohol, Tobacco and Firearms Special Agent Jeffrey Cochran in the investigation due to the number of firearms the Armstrong ring utilized in connection with their narcotics trafficking.

9. When I initiated the investigation into the Armstrong crack ring, I knew neither the identities, nor the races of any of the other co-defendants. They became known to me only after they appeared at the crack sales and participated in the narcotics transactions.

10. I did not select defendants for investigation or prosecution; in essence, they selected themselves by appearing and playing various active roles in the crack trafficking ring. For example, defendants Rozelle, Mack, and Hampton were targeted because they delivered and/or sold crack cocaine to purchasers who had negotiated the transactions with defendant Armstrong. Defendant Martin was targeted after being identified as an armed guard inside the hotel room which Armstrong operated as a crack house.

I declare that the foregoing is true and correct to the best of my knowledge.

DATED: September 15, 1992

MARK CAMPBELL
Detective, Narcotics Division
Inglewood Police Department

DECLARATION OF JEFFREY COCHRAN

I, Jeffrey Cochran, declare and state as follows:

1. I am employed as a Special Agent with the Bureau of Alcohol, Tobacco and Firearms (ATF). I have been so employed for over three years. Prior to that I was a police officer in Orange, Texas for over three years, and investigated narcotics cases in conjunction with a federal and state joint task force. I am currently assigned to a joint task force with Inglewood Police Department to investigate federal narcotics and firearms violations.

2. It has never been the policy of ATF to base any investigative decisions on the basis of a defendant's race. Investigations are based solely on information regarding the nature of the federal criminal violations regardless of race, sex, religious affiliation, or any other sociological factors.

3. I was assigned to the City of Inglewood to investigate federal firearms violations in violation of 18 U.S.C. §§ 922, 924. I have worked closely with the Inglewood Police Department Narcotics Unit because of the great number of firearms recovered in narcotics investigations.

4. With respect to this case, I became involved in February 1992, after being informed that these defendants may be using firearms in the protection of a narcotics trafficking ring led by defendant Christopher Armstrong. During the investigation, we obtained evidence that firearms were being illegally utilized in such a manner, and I decided to recommend this case for federal prosecution.

5. Defendants were not chosen because of their race; in fact, at the initiation of the investigation I was unaware of how many suspects were involved in the ring, and was unaware of the race of any of the potential suspects. The investigation and subsequent recommendation for federal prosecution were based solely on the fact that there were provable federal firearms violations and federal narcotics

violations, which were sufficient to meet the guidelines of the United States Attorney's Office.

6. Since my assignment to the joint task force in Inglewood, I have participated in over 40-50 arrests of narcotics and/or firearms offenders of various ethnic origins, of which only three cases were referred for federal prosecution because they met the requisite quantity of narcotics and number of firearms involved. The remaining majority of narcotics and firearms offenders, many of whom were black, were referred to the State District Attorney's Office for prosecution.

JEFFREY COCHRAN

Special Agent

Alcohol, Tobacco and Firearms

DATED: September 15, 1992

DECLARATION OF DAVID C. SCHEPER

I, DAVID C. SCHEPER, hereby declare as follows:

1. I am an Assistant United States Attorney and Chief of the Major Crimes unit in the United States Attorney's Office for the Central District of California. I have been employed with the United States Attorney's Office for over five years and have served in a supervisory capacity for two years. From September 1990 to June 1992, I served as Chief of the Criminal Complaints Section—the Section in charge of directing and supervising most charging decisions for the Criminal Division of the United States Attorney's Office.

2. In all of my years at the United States Attorney's Office, including my tenure as Chief of the Criminal Complaints Section, a particular defendant's race has never played any role in a decision whether to charge him or her with a crime. In fact, the race of suspects brought for consideration for federal prosecution is hardly ever mentioned, and is in most cases unknown at the time a charging decision is rendered. In a relatively low proportion of cases, the race of a suspect is made known for the specific purpose of ensuring that arrests and prosecutions are not based upon unconstitutional motivations.

3. All charging decisions are made on the basis of whether a federal offense that meets this Office's guidelines has occurred, the overall strength of the evidence, the deterrence value and federal interest associated with the particular case, the criminal history of the suspects, and other race-neutral criteria.

4. In of 1992, while serving as the Chief of the Criminal Complaints Section, I supervised all charging decisions at that time, including the indictment decision of *United States v. Armstrong, et al*, CR No. 92-336-CBM.

5. The decision to charge this case was consistent with, and met the general criteria applied to all cases brought for consideration. In particular, in the *Armstrong* case there was over 100 grams of cocaine base involved, over twice the threshold necessary for a ten year mandatory minimum sentence; there were multiple sales involving multiple defendants, thereby indicating a fairly substantial crack cocaine ring; the case was jointly investigated with a federal agent from the Bureau of Alcohol, Tobacco and Firearms; there were multiple federal firearms violations intertwined with the narcotics trafficking; the overall evidence in the case was extremely strong, including audio and videotapes of defendants; threats had been made to arresting officers by defendant Armstrong; and several of the defendants had criminal histories including narcotics and firearms violations. Defendants' race played absolutely no role in the decision whether to charge them. I have no recollection of the race of the defendants ever being discussed.

6. During my tenure as Chief of the Criminal Complaints Section, there were many instances where the Office declined prosecution in narcotics cases, including crack cocaine cases. Decisions to decline prosecution, like decisions to accept cases for prosecution, were made on the basis of the criteria outlined above. No one is prosecuted because of his or her race, and no case was declined because of the race of the suspect.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DAVID C. SCHEPER

DATED: September 15, 1992

DECLARATION OF LAWRENCE H. CHO

I, LAWRENCE H. CHO hereby declare and state:

1. I am the Assistant United States Attorney assigned to prosecute the case of *United States v. Armstrong, et al*, 92-336-CBM.

2. Pursuant to this Court's Order of September 8, 1992, I contacted the Systems Manager with the Office of the United States Attorney, Gordon Gibson, who generated a listing of all defendants charged with narcotics violations under 21 U.S.C. §§ 841 and 846 for the past three years.

3. According to the printout, which is attached as Exhibit 1, there have been approximately 2,400 defendants charged with violations of 21 U.S.C. § 841, and approximately 1,700 defendants charged with violations of 21 U.S.C. § 846 in the past three years. According to Gordon Gibson, an accurate tally of the actual number of defendants charged is not yet attainable due to the fact that there are multiple entries in the system for certain defendants. However, it is safely estimated that over 2,000 have been charged under § 841, and over 1,700 have been charged under § 846.

4. On or about September 14th and 15th, 1992, an informal survey was conducted amongst members of the Major Narcotics Unit of the United States Attorney's Office concerning the race of various cocaine base defendants that have been brought by this Office. The survey yielded seven different non-black defendants that have been prosecuted for cocaine base violations; four of whom either were or are currently being represented by the Public Defender's Office:

(i) *United States v. Morales, et al*, CR 89-544-RJG, two non-black defendants, with defendant Tony Morales represented by Deputy Federal Public Defender Denise Meyer;

(ii) *United States v. Edwin Quintana Garcia*, CR 89-919-Kn;

(iii) *United States v. Carlos Cortez*, CR 89-520-R, defendant Cortez was represented by Deputy Federal Public Defender Karen Woods;

(iv) *United States v. Derrick Bines, et al*, CR 92-613-LEW, two out of eight defendants are non-black, with defendant Abraham Bernard Gutierrez is represented by Deputy Federal Public Defender Derek Li.

(v) *United States v. Moises Escamilla*, CR 92-620-Kn, with defendant Escamilla being represented by Deputy Federal Public Defender Myra Sun.

5. I have also ascertained from other members of my office the fact that the same selective prosecution request and supporting Declaration has been unsuccessfully submitted by the Public Defender before the Honorable J. Spencer Letts in *United States v. Thomas Arlington Pratt*, CR 91-953-JSL, and the Honorable Chief Judge Manuel L. Real in *United States v. Albert Jordan*, CR 91-1062(A)-R. A copy of the transcript of the hearing on the request before Judge Letts in *Pratt* is attached as Government's Exhibit 3, and a copy of Judge Real's Findings of Fact and Conclusions of Law in *Jordan* is attached as Government's Exhibit 4.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

LAWRENCE H. CHO

DATED: September 15, 1992

Crack Cocaine

Overview 1989



Drug Enforcement Administration
U.S. Department of Justice

This CRACK/COCAINE Overview 1989 was written by Staff Coordinators John W. Featherly and Eddie B. Hill of the Cocaine Investigations Section, under the direction of Charles Gutensohn, Chief of Cocaine Investigations Section and Michael Mullen, Deputy Chief-Cocaine Investigations Section.

TABLE OF CONTENTS

	<i>Page</i>
Crack Cocaine Overview	87
Creating the Market	91
Street Gangs	92
Jamaican Gangs	96
Organized Crime Comparison	101
DEA Enforcement Efforts	101
DOJ/BJA Crack Task Force	102
Conclusion	103
Appendix A. Synopsis of DEA Field Division Responses on Crack Cocaine	104

List of Figures

Figure 1 Crack Availability in the U.S. CY 1988 ..	111
Figure 2 Cocaine Related Emergency Room Mentions 1983 to 1988 (By Administration)	112
Figure 3 Population Estimates of Cocaine and Crack — Rise in ER Cases	113
Figure 4 Total Dawn Emergency Room Mentions for Cocaine Smoking	114
Figure 5 Gang Hand Signs	115, 116
Figure 6 Location of DEA Crack Teams, BJA Crack Task Forces and BJA Street Sales Units	117

COVER: Numbers 187's refer to the California Criminal Code for homicides. This is often written on walls to signal an assault or to claim credit for a shooting. The figure's hand denotes "gang signing" which identifies gang or "set."

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CRACK/COCAINE

The past several years have witnessed a dramatic increase in the trafficking and use of cocaine. Wholesale and retail prices for cocaine hydrochloride (HCL) have declined, while purity levels for kilogram amounts of cocaine remain 90 percent and higher. Street-level gram purities have risen from 25 percent in 1981 to 70 percent in 1988. Seizures of cocaine HCL by the Drug Enforcement Administration (DEA) have increased substantially in the last decade. Approximately 60,000 kilograms were seized in 1988 compared to almost 200 in 1977. Cocaine investigations continue to constitute a major thrust of DEA enforcement activity. Cocaine arrests comprised nearly 65 percent of the DEA's total arrests in 1988.

A by-product of the increased supply and demand for cocaine in the United States has been the evolution of a phenomenon known as "crack." Crack is an inexpensive, highly addictive, physically and emotionally destructive cocaine derivative that is being abused in near epidemic proportions in some communities.

Abundant supplies of high purity cocaine (HCL) for lower prices have made it possible and highly profitable for dealers to develop less expensive cocaine products. Whereas cocaine HCL is available on the street at approximately 70 percent pure per gram at an average cost of \$100, crack is sold at purity levels of 75-90 percent for \$10 per 1/10th of a gram. Never before has any form of cocaine been available at such low cost and high potency.

The availability of crack was first reported in Los Angeles, San Diego, and Houston in 1981. This form of cocaine abuse was considered a localized phenomenon until late 1985. It was then that crack became a serious problem in New York City. Crack cocaine literally exploded on the drug scene during 1986 and was reported

available in 28 states and the District of Columbia. It is currently available in almost every state. (See Figure 1).

The use of crack cocaine has evolved, in a few years time, to become a major medical problem. At this time, there is no separation of cocaine (HCL) and crack cocaine statistics. Admissions to cocaine treatment programs as well as cocaine-related emergencies and deaths continue to mount. Estimated cocaine-related hospital emergencies have increased significantly since 1984. (See Figure 2)

The number of Drug Abuse Warning Network (DAWN) cocaine related hospital emergencies reported nationwide during 1987 was the highest yet recorded, increasing by more than 60 percent over the previous year's record total. During 1987, 32,776 cocaine-related hospital emergencies were reported through DAWN, as compared to 18,991 emergencies reported during 1986. Since 1984, there has been a marked increase in the number of cocaine-related hospital emergencies reported through DAWN nationwide. (See Figure 3).

COCAINE ABUSE INDICATORS, 1984-1988

	1984	1985	1986	1987	1988
Hospital Emergencies Reported Through the DAWN System	8,201	10,371	18,991	32,776	20,192
					*Jan-Sept
Cocaine-Related Deaths (less New York City) data	666	748	1,269	1,805	893
					*(1st 6 months data) (est.)

The first reported smoking of cocaine occurred in Peru during early 1976. This South American practice involves smoking coca paste, which is an extract produced during the manufacture of cocaine from coca leaves. From Peru coca paste smoking has spread to Colombia, Bolivia, Ecuador, and other Latin American countries. Coca paste,

also known as cocaine sulfate or basuco, can contain up to 80 percent cocaine sulfate. Other alkaloids that are found in coca leaves are benzoic acid, kerosene, sulfuric acid and other impurities. Coca paste smoking is the most inexpensive form of cocaine abuse because it sells for as little as one dollar per dosage unit. It is usually sprinkled on tobacco or marijuana leaves and smoked. Heavy addiction often results in severe physical and mental disorders primarily because of impurities found in the paste.

Coca paste is prevalent in illicit trafficking where it is intended for conversion into cocaine hydrochloride. It is often smuggled from Peru and Bolivia to laboratories in Colombia, Ecuador, Central American and, more recently, South Florida. It is rarely sold at the user level in the United States and is primarily restricted to upper-level dealers who have technical resources for chemical processing. Sporadic episodes of coca paste smoking, however, have been recently observed in New York, Los Angeles, and Miami. These represent the first incidence of use by foreign nationals involved in cocaine processing and trafficking.

Freebase is the purified base form of cocaine processed from the hydrochloride salt using flammable chemicals, such as ether. It appears as a white, crystalline powder. Freebase was introduced as a method of smoking cocaine in California during the mid-1970's. During this period, freebase use was generally restricted to hard core abusers who would often spend thousands of dollars smoking freebase in just a few days time. The freebasing of cocaine hydrochloride with ether was a complex chemical process that risked fires or explosions, in addition to being expensive.

In the past year the use of crack has become increasingly prevalent in many metropolitan areas. Crack is also referred to "rock," "base," "freebase," "cooked cocaine," or "gravel." Unlike the processing of freebase

crack is made without flammable chemicals like the highly explosive ether. The base form of crack, however, is manufactured by mixing cocaine hydrochloride with either baking soda and water or ammonia and water, thus eliminating the dangers of explosion or fire encountered with traditional freebasing.

Unlike cocaine hydrochloride, crack or other base forms of cocaine, can be heated. The fumes can then be inhaled or smoked, but the hydrochloride must be converted back to a relatively pure base state before it is suitable for smoking.

Cocaine freebase crack differs from crude cocaine base in that freebase (or crack) does not contain companion cocaine alkaloids, solvents or other residue from the leaf extraction process. It can be described as a "backwards" chemical procedure, starting with cocaine hydrochloride that is sold as street cocaine. Through simple chemical procedures, the cocaine alkaloid (benzoylecgonine) is "freed" from the hydrochloride salt, thus yielding cocaine as the "freed" or freebase.

It is important to note that freebase (or crack) and crude cocaine base are both classified as cocaine base. Freebase (or crack) is a cleaner and purer form of cocaine base since it undergoes a double-cleansing process (i.e., from cocaine base to cocaine HCL and back to cocaine base). Crude cocaine base, however, is a less pure form of cocaine base made directly from coca paste.

The smoking of crack is the most efficient way of ingesting cocaine and the crack user receives an almost instantaneous, intense high lasting only a short period of time (usually eight to ten minutes) which is often followed by depression and manic episodes. The user is often in a situation where he must consume larger and larger amounts of crack to even out these extreme periods of crack highs and lows. Therefore, the primary danger of crack is the drug's ability to cause an extremely rapid and severe

addiction that controls the users' behavior and dominates their lives. Many crack users also become addicted to alcohol, tranquilizers, or heroin which are all taken to alleviate the unpleasant side-effects of crack use.

The majority of crack available in the United States was first believed to originate from independent, cottage industry traffickers. DEA investigations in late 1986 and early 1987, however, began to delineate a fundamental change in the structure of crack trafficking. Several large scale trafficking groups, whose structure is beginning to approach that of mid-level cocaine or heroin dealers, have begun to emerge. Their presence (i.e., corruption, homicides) has become apparent as power struggles over drug territory develop among successful, small cottage industry groups, inner-city street gangs, and large-scale Jamaican organizations that attempt to expand their marketing area.

CREATING THE MARKET

Crack cocaine is the fast food of drugs. The consumer is supplied with a ready to use material that can be purchased quickly and for small amounts of money. This opens the consumer market to a wider spectrum of abusers, including youth and the poor. Cases have been documented where users have spent hundreds of thousands of dollars by buying \$10 and \$20 "rocks" over the course of a one year period.

Since it is virtually impossible to produce the amounts of money needed to sustain a crack habit, the frequent or compulsive user is forced into criminal activities, e.g., robbery, drug trafficking, prostitution etc. to generate the needed funds to purchase the drug.

Crack dealers do not need a large central supplier, so going into this business is relatively safe and cost efficient. Organizations that typify the traditional cocaine operations

are usually nonexistent in crack sales. The crack sales are usually conducted by various street gang members or "sets."

STREET GANGS

CRIPS GANGS

The Crips gangs was initially said to have been formed by Raymond Washington of Los Angeles, California. Their first activity was on a high school campus, in south-central Los Angeles. They were most likely named after the "Tales of the Crypt" movie or a comic book of the same name. Their gang color, blue, was derived from Washington High School in Los Angeles. Crips generally wear a blue bandanna or handkerchief on their person or blue article of clothing (shirt, shoelace, jacket, hat, belt, hair roller). They often refer to each other as "Cuz." They use the letter "C" to replace the letter "B" in conversations and writings. They don't use the letter "B" because their rival, the Bloods, gang name starts with the letter "B". They write blue graffiti on walls to make boundaries, and sign their messages "CRIPS," "CUZ" "B/K" (Blood Killer) or "P/K" (Piru Killer). They will fight among sets as well as with other gang "sets."

BLOOD GANGS

The Bloods gangs were reportedly founded by Sylvester Scott and Vincent Owen. They were called Compton Pirus from West Pirus Street, and developed to protect themselves from CRIPS. Their gang color, red, was derived from Centennial High School colors in Compton, California. Bloods wear red "rags" or red articles of clothing. They refer to each other as "BLOOD", "PIRU", "C/K". They seldom, if ever, fight among themselves. The Bloods sets are rumored to be the most ruthless of Los Angeles street gangs next to the Crips.

CRIPS AND BLOODS GANG MEMBER PROFILE

1. Black Males 12 to 24 years of age.
Primary Age: 12-20 Most Violent Age Group: 14-18
Average Age: 18 (Shot Callers: Late 20s to Early 30s (Leaders))
2. Rarely have identification on their person.
3. Use alias names or nicknames.
4. Hairstyles are close cropped or jeri curls.
5. Give local addresses and phone numbers. However, they often use L.A. zip codes and areas codes.
6. Clothing is predominantly blue for Crips and red for Bloods/Pirus.
 - a. FILA brand jogging outfits and tennis shoes. (Fad items that change regularly)
 - b. National baseball/football jackets and caps (usually adhering to gang color themes).
 - c. ADIDAS graphic sweatshirts.
 - d. Levis 501 or blue/brown cotton work pants. Pants are worn low on hips called "sagging".
7. Non-verbal communications
 - a. Wall writing (graffiti) to communicate hostility, territory boundaries, and respect for dead members. These writings are often the first signs of gang infiltration. Hand signals that signify gang affiliation (see Diagram 4).
8. Large gold chains and rings.
9. Initially defendants would admit gang affiliations when arrested, however recently they have been reluctant to identify their gang connections.

MENTALITY OF CRIPS AND BLOODS STREET GANGS

Extremely violent.

No remorse when killing innocent by-standers.

Will kill police officers in cold blood; this type of violence brings greater prestige to the shooter.

Philosophy changing from controlling neighborhoods to making large amounts of money.

The more successful drug sets are becoming organized. They operate in a more business-like manner, are profit-oriented, and sophisticated in tactics, i.e., use of computers, and standard business practices.

Crips and Bloods sets are showing signs of cooperating with each other in drug trafficking to promote drug sales and to set up funds for bail and attorneys.

Older members are purchasing legitimate businesses such as car washes, auto painting/body and fender shops, auto dealerships, liquor stores, motels, etc. to launder money.

SETS AND TERRITORY

The two most notorious Los Angeles gangs, the Bloods and Crips, are not really gangs at all. Instead, the names denote legendary confederations among hundreds of subgroups, or "sets". Sets are formed along neighborhood lines, and only a few have more than 100 members (bangers), 20 to 30 members is commonplace. Leadership is usually collective, and internal organization is rudimentary. One gang expert with the Los Angeles Police Department, Deputy Chief Glenn Levant, states "most sets are as casually organized as a pickup basketball game. Bloods wear red and Crips wear blue; traditionally, each gang member wears or carries (a bandanna) his "rag" to show his colors." (Many gangs also use "signs", which are hand gestures like a letter of the deaf alphabet, for

identification when the members are not wearing their colors.) Local variations on the theme are endless, the Crips gangs are almost as likely to fight each other, as they are to fight the Bloods.

The days when rival gangs fought each other only over turf and colors are fading fast. In Los Angeles, Chicago, New York and dozens of other cities, gang conflicts have become a form of urban-guerrilla warfare over drug trafficking. Informers, welshers and competitors are ruthlessly punished, many have been assassinated. Gang turf, which is still demarcated with graffiti in Los Angeles, now involves more than bragging rights; it is sales territory. Some gang graffiti are coded threats. One in south-central Los Angeles reads as follows: "Big Hawk 1987 BSVG c 187." In translation Big Hawk is a gang member's street name; BSVG stands for Blood Stone Villains Gang, a Blood set. The low-case c, which is deliberately x'd out, indicated that the writer kills Crips, and the number 187 refers to the section of the California criminal code for murder.

The crack gangs, dealers, posses, or whatever label you wish to apply, have many similar characteristics. Poverty is the seed from which they all develop whether it be in the slums of New York and Los Angeles for the Bloods and Crips or the slums of Kingston, Jamaica. Crime is the ladder, not only to success, but to the next step in the direction of daily survival. The other common characteristic, although not universal, is that their origins are from minority groupings. The third point is youth. For the purpose of this publication, youths are considered anyone up to the age of twenty-five. Socioeconomic factors such as poverty and poor living conditions continue to be the major factors in the recruitment of youth into these gangs.

JAMAICAN GANGS

When one thinks of Jamaicans gangs, one immediately thinks of drugs and guns which are equated with violence. Jamaicans are distributing crack throughout the country in organized gangs called POSSES. The appearance of Jamaican Posses or "Passes" within the United States is thought to have evolved around 1974. Jamaican gangs like the Raetown Boys and the Dunkirk Boys (well organized Jamaican gangs) probably arrived in New York City in 1976. Posses have turned from roles as extortionists and "hitmen" to the trafficking of crack cocaine.

Jamaicans, when they infiltrate a new area, will seek out single black females, with dependents who are generally on public assistance, to facilitate their operations by securing rental cars, leasing apartments and stores to distribute the crack.

Jamaicans are now using letters to code telephone numbers in their address and telephone directories.

Jamaicans also utilize rental cars, buses and AMTRAK trains for their couriers to transport cocaine HCL from large urban areas to other distribution sites in the United States and Canada. Invariably, the cocaine HCL will be converted to crack locally.

The following is an outline of Jamaican Posses:

1. Originated in ghettos of Kingston between 1974 and 1976.

2. Clanish, will not admit non-Jamaicans in inner circle. Posses based on geographical and political ties:

Roles:

- 1) Delineate and protect political zones from opposition.
- 2) Raise funds for affiliated political party through crime.
- 3) Provide physical protection for drug traffickers.

Independence:

Posses are now generally independent from political ties. Money and power are now more important than political allegiance.

Political Parties:

- Jamaican Labor Party (JLP)
- Peoples National Party (PNP)

Largest Posses:

- Shower (JLP)
- Hot Steppers (PNP)

Tolerance:

Posses will, on occasion, work together in U.S., but not in Jamaica.

Ramifications:

- 1) Money from drugs and guns are pouring into Jamaica, creating a false and unstable economic base.
- 2) A generation of youth are being corrupted.

JAMAICAN POSSES PROFILE

1. Black males of Jamaican decent 17 to 35
2. Recruited in Jamaica
3. Indiscriminate use of high powered weapons
4. Extremely violent behavior
5. Use of rental/lease vehicles, Volvos preferred
6. False identity a rule
7. Headquartered in local Jamaican clubs and restaurants

MAJOR POSSES OPERATING IN THE UNITED STATES

Shower Posse—Miami, New York, Philadelphia, Pittsburgh, Boston, Cleveland, Dallas, Washington, D.C., Los

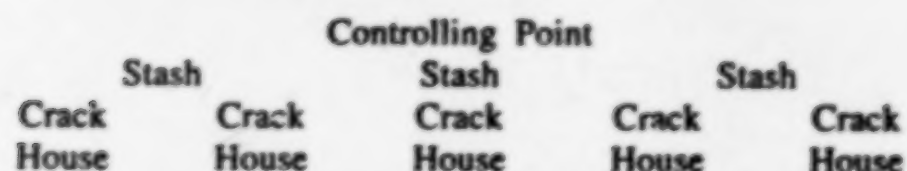
Angeles, Seattle, Denver, Kansas City, Atlanta, and Detroit.

Waterhouse Posse—New York, Washington, D.C., Atlanta, Miami, Boston, Philadelphia, Cleveland, St. Louis, Kansas City, Houston, and Los Angeles.

Spangler Posse—New York, Boston, Washington, D.C., Philadelphia, Pittsburg, Atlanta, Miami, Houston, Dallas, Cleveland, Los Angeles, and Seattle.

Montego Bay Posse—New York, Boston, Washington, D.C., Philadelphia, Pittsburg, Cleveland, Atlanta, Miami, Houston, and Seattle.

The following is a diagram of Jamaican domestic crack distribution methodology.



Jamaicans traditionally import and/or distribute small amounts of cocaine, crack and marijuana. Commercial airlines are the preferred method of shipment of drugs and money. They also utilize Federal Express, rental trucks, rental/lease vehicles, and public transportation.

Couriers:

Primarily Jamaican females

Several couriers on each flight (unknown to each other)

Concealment Methods:

Body, luggage, packages marked as food items, presents, etc.

Payments to key Posse members:

- 1) Wire transfer when under \$10,000
- 2) Courier when over \$10,000

Role of Women:

Act as couriers, rent apartments, cars, and utilities in their names, and register cars. As informants, they can be excellent sources of information on selected operations.

Narcotics Distribution:

High level dealers don't pay for drugs until after they are sold.

Street dealers recruited from Jamaican/U.S. communities. American Blacks used at lower levels.

Businesses:

Garages, music and record shops, auto body repair, Reggae bands, import/export companies, restaurants*, boutiques*, rental car and truck companies.**

* Meeting locations and possible drug outlets

** Used to transport money, drugs, and firearms

In reviewing the 1950's Kefauver Committee conclusions on organized crime, they appear to be very similar to the conclusions one might make concerning gangs distributing crack today. These gangs seem to have the same evolving crime pattern as the traditional organized crime families have had in the past.

The following is a point-by-point comparison of the 1950's Kefauver Committee conclusions on organized crime as compared to the crack gang problem of today.

FINDING AND CONCLUSIONS

Kefauver Committee

Crack Trafficking Gangs

- | | |
|--|--|
| 1. Organized Crime is entrenched mainly in the large cities. | Entrenched mainly in large cities, with some rural representation. |
|--|--|

Kefauver Committee

- | | |
|--|---|
| 2. Enforcement and punishment by murder, other violence. | Indiscriminate use of violence to control selling areas; including murder. Operate on a "no innocent bystander" theory. |
| 3. Main families maintain a loose control over affiliates. | Splinter groups in cities outside of cities of origin maintain a loose association with main group/gang. |
| 4. Association is based on ethnic/geographical location. | Informal association based on ethnic and geographical backgrounds. |
| 5. Organized crime groups control and monopolize distribution areas. | Gangs mark turf with graffiti and/or violence to insure territorial control. |
| 6. Organizers, leaders, dons etc. are removed from direct law enforcement action by use of "soliders" or street people. | Gang leaders or founders insulate themselves by the use of youth and/or street people. |
| 7. Most profits remain in organization for use by leaders to finance their continuing operation. | Profits from crack sales finance operations. |
| 8. Large scale narcotics distribution continuously use interstate communication and transportation facilities to conduct their business. | Crack gangs, as a matter of course, use car phones, fax machines, commercial planes and trains to carry out business. |
| 9. Wherever narcotics are openly allowed to be distributed public corruption is likely. | Crack sales are openly conducted in areas of understaffed and/or under paid police officers. Corruption is becoming widespread. |

*Crack Trafficking Gangs***SIMILARITIES SHARED BY ORGANIZED CRIME AND THE STREET NARCOTIC GANGS**

1. The Treasury of the United States is being defrauded of large sums of money by these criminal gangs.
2. Lawyers and accountants are still in close contact with criminal gangs or individual gangsters and some of them are violating canons of ethics and may even be an integral part of the criminal conspiracies of their clients.
3. Legitimate businessmen are aiding the interests of the underworld by making their facilities available to criminal enterprises or by awarding valuable franchises and contracts to notorious criminals.

DEA Enforcement Effort

DEA crack teams are now operational in fifteen (15) cities including Minneapolis, Dallas, Denver, Detroit, Houston, Miami, Fort Myers, Fort Lauderdale, New York City, Phoenix, San Diego, San Francisco, Kansas City, Seattle and Los Angeles.

Formal crack teams have not yet been implemented in Atlanta and Philadelphia since the crack problem is not considered severe in these cities. The crack situation, however, continues to be monitored in the event that these teams may be needed at a later date. St. Louis will establish a crack team in the near future as will Washington, D.C.

DEA is striking at the source. This is being done by operations such as SNOWCAP, BOLIVAR and CALICO that target the coca-growing countries. The operations are being conducted by DEA agents and elements of the U.S. military in conjunction with the police departments and military of the involved foreign country.

Secondly, DEA is attempting to target drug smugglers with operations such as ALLIANCE and PIPELINE. These operations target drug smuggling groups that operate on the U.S. borders and on the nations highways.

Finally, DEA is targeting established drug organizations and traffickers with DEA Crack Task Forces, BJA funded state and local enforcement task forces, and community support in the area of demand reduction. DEA HQS has established several operations directed at the crack cocaine problem in the form of Special Enforcement Operations (SEO's) and an intelligence project (SEP) that will develop a crack/gang-related data base. These operations are headquarters directed and field division supportive.

DOJ/BJA Crack Task Forces

The Anti-Drug Abuse Act of 1988 has provided approximately \$150 million to the Department of Justice, Bureau of Justice Assistance (BJA) grant program for fiscal 89 narcotic related programs. DEA submitted a program brief (i.e., concept paper) for the establishment of a crack investigation program to BJA. This brief was incorporated into the BJA grant program and \$1.5 million was made available for the establishment of five (5) Crack Task Forces. Subsequently, BJA Task Forces are established in the following cities: Los Angeles, CA; Houston, TX; Minneapolis, MN; Denver, CO; Detroit, MI; Miami, FL; Baltimore, MD; Nassau County, NY and San Diego, CA (see Figure 5). DEA assists these Task Forces through mutual sharing of timely information on crack trafficking organizations and by attending the periodic meetings of these Task Forces sponsored by BJA. BJA also funds street sales units (local police departments) in New Orleans, LA; Birmingham, AL; Seattle, WA; Long Beach, CA; Orlando, FL; San Antonio, TX; Oakland, CA and Rochester, NY.

State and Local Task Forces

DEA supports six (6) state and local task forces and 12 shared funding task forces in which DEA special agents and officers from state and local law enforcement agencies

cooperate on narcotics investigations in order to disrupt the illicit traffic in certain geographic areas. By definition, these task forces are geared to mid-level and street violators. A number of major cities which are experiencing crack problems have these task forces in operation. These state and local task forces were recently enhanced by a \$10 million appropriation under the Anti-Drug Abuse Act of 1986.

Conclusion

Crack cocaine trafficking and abuse have become a serious problem for all law enforcement agencies throughout the United States. Although the problem has spread to rural and suburban areas, crack cocaine remains a predominantly inner-city, urban phenomenon that is mainly confined to minority sections. However, the use of crack is now manifesting itself in all strata of society. Large-scale, interstate trafficking networks controlled by Jamaicans, Haitians and Black street gangs dominate the manufacture and distribution of crack. Prices for this highly addictive form of cocaine base have remained stable and high levels of drug purity have been maintained since crack became prevalent on the American drug scene in early 1986. Kilogram and pound seizures, once the exception, are becoming more common. The cooperative relationships between Federal law enforcement agencies, DEA Crack Teams and state and local task forces have proven highly effective in targeting and immobilizing large-scale distributors and interstate trafficking networks. These cooperative efforts must continue in order to stem the crime and violence spawned by the crack cocaine phenomenon.

APPENDIX A
SYNOPSIS OF DEA FIELD DIVISION RESPONSES
ON CRACK COCAINE AS OF JANUARY 1, 1989

Atlanta—Crack is available in adequate consumer quantities throughout the Division and can be classified as a sporadic, retail-level trafficking situation. Georgia and the Carolinas are primarily transit states for crack originating in Florida and destined for the northeastern United States.

Boston—In the New England region, crack is found predominantly in the southern states of Connecticut, Rhode Island and Massachusetts. Connecticut, with its proximity to New York City, is experiencing the most significant crack problem in the Field Division. New Hampshire, Vermont and Maine have encountered very little crack use to date. Crack availability has increased in Stamford, CT and is imported from the Bronx, NY. The availability of crack has significantly risen in Providence, RI and is principally controlled by Dominican and Puerto Rican groups there.

Chicago—Chicago does not have a serious crack problem at this time. Sporadic appearances of crack have been reported in North Dakota, Indiana and Wisconsin. Crack houses have recently appeared in South Bend, IN and Peoria, IL. Crack cocaine availability, however, has increased in the Minneapolis-St. Paul areas.

Dallas—Crack remains a serious problem in Dallas, TX. Over 75 crack houses are currently operating in the city. Crack distribution is controlled by a 500-700 member Jamaican controlled cartel. Leaders of at least 27 Jamaican organizations comprising this cartel have been targeted for investigation. The DEA D/FW Airport State and Local

Task Force reports the arrest of two (2) or three (3) Jamaican crack or money couriers from Miami and New York on a daily basis. Over 20 Jamaican-related crack homicides have been reported in 1987. The Fort Worth Police Department reports that crack and fortified crack houses are becoming more prevalent. California is the main source for Tulsa, OK. Crack is readily available in Oklahoma City, with West Coast sources of supply.

Denver—Crack availability has increased tremendously in the last six (6) months. The Denver State and Local Task Force, in conjunction with the Denver Police Department, has conducted several crack investigations over the last two (2) years. These investigations revealed that crack houses in the city of Denver were run by Jamaicans with the assistance of locally recruited black females. The price of a retail level dose of crack cocaine (\$25 for one-tenth of a gram) is one of the highest in the nation. Suburban dealers convert their own cocaine HCL into crack rather than purchasing the substance from Jamaicans in metro Denver.

Detroit—Crack cocaine is readily available in the cities of Detroit and Flint. Limited quantities of crack have been reported in Kentucky and Ohio. Although heroin use is still a problem in Detroit, it is overshadowed by the availability of cocaine HCL and crack. It is estimated that 1,000 crack houses and street corner locations operate in Detroit at any given time. Intelligence information reveals that there are at least six (6) major crack trafficking organizations in the Detroit metro area. One of these groups converts 50 kilos of HCL into crack per week. Crack-related deaths and emergency room mentions have increased dramatically over the past several years.

Houston—The crack problem in the Houston Division has somewhat diminished. The crack problem in the city of

Houston is essentially situated in predominantly black neighborhoods. Crack is supplied both locally and from sources in Miami and Los Angeles. The Houston Police Department has made over 580 arrests for crack sale/possessions over the last year. San Antonio is the only city in the Division which had a crack investigation in the last three (3) years. This investigation involved a small crack house operation.

Los Angeles—Crack is a problem of epidemic proportion in Los Angeles, Riverside, Santa Barbara and Las Vegas. Crack is available in multi-kilogram quantities throughout the Los Angeles area. Crack cocaine manufacture and distribution are primarily controlled by black street gangs (the Bloods or the Crips) in south central Los Angeles. Kilogram quantities can be purchased for \$15,500 to \$19,500. The black street gangs have distribution networks throughout the northwestern and southwestern United States. Crack has appeared in Hawaii, but is not considered a serious problem.

Miami—Crack cocaine is readily available on the streets of Miami, Ft. Lauderdale, Tampa, several areas in central Florida and the northern Florida cities of Tallahassee and Pensacola. Crack distributors from southern Florida are expanding operations into the Pensacola and Tallahassee area of northern Florida in an attempt to create new markets and/or take over existing crack markets. In FY-87, the Tampa Office participated in 100 crack investigations. The Metro-Dade Police Department reported 577 arrests in FY-87. It is estimated by local authorities that there are over 700 crack houses in Miami. The Ft. Lauderdale Office participated in over 1,500 arrests in FY-87. The Ft. Myers crack team is investigating a 75 member trafficking group that distributes throughout Florida, Georgia, the Carolinas and California. DEA Miami has identified two (2)

interstate trafficking networks, one (1) which spreads across Florida, Georgia, South Carolina and Tennessee, and the other involves the East Coast to New York, extending west, through Texas and Nevada to California.

Newark—The Newark Division reports no crack cases in FY-87. The crack situation in New Jersey has leveled off or is on the decline and no city in New Jersey has reported an increase in crack cases or in the use of crack. Crack, once readily available in New Jersey, is now only moderately available in Camden, Trenton, Patterson and Hackensack.

New Orleans—Crack continues to increase in popularity among cocaine abusers, particularly along the Gulf Coast. In Louisiana, metropolitan New Orleans has the largest crack problem. Abuse levels in New Orleans have increased to a level where suppliers are dealing in kilogram quantities. A black street gang (Crips) from Los Angeles has emerged as the main source of crack. The Shreveport Office reports two investigations that resulted in the seizure of 250 grams of crack. The availability of crack has declined in Monroe, Louisiana. The Mississippi Bureau of Narcotics reports the greatest increases (crack trafficking) in central and southeastern Mississippi (Gulfport and Pascagoula). A crack group consisting of 80 members was recently immobilized in Mississippi. Pascagoula, Mississippi has reported a five (5) ounce crack seizure which originated in Los Angeles. Crack cocaine availability is on the rise in Alabama; however, the amounts surfacing are believed to be for personal use only.

New York—Crack trafficking and abuse continues to be a serious problem in New York City and the surrounding suburbs. It is available on a limited basis in upstate New York. Several large crack organizations, whose structure

approaches that of mid-level cocaine or heroin dealers, have appeared in New York City. The Division is investigating several organizations capable of supplying 10,000 vials of crack per week. Primary crack traffickers are of Dominican origin. During the first seven (7) months of FY-87, the NYCPD made 9,059 crack arrests, accounting for about 72 percent of all cocaine arrests.

Philadelphia—Crack cocaine houses, under control of Jamaican trafficking organizations, are beginning to surface in the Philadelphia Field Division. In early 1987, nearly two thousand vials of crack were seized in two (2) separate raids on crack houses in the city of Philadelphia. The Wilmington Office reports a crack problem in the southern Delaware area. Fifteen crack related arrests and 12 pounds of crack have been seized during 1987. These investigations centered around a Haitian farm labor community. Neither Harrisburg nor Pittsburgh report having a crack problem at this time.

Phoenix—Crack cocaine is available in the public housing areas of Phoenix and is dealt entirely by blacks. Crack is also readily available in Tucson. Crack cocaine in Arizona is supplied by the Crips and Bloods gangs of Los Angeles, California. In June 1987, the Phoenix State and Local Task Force culminated a four (4) month crack investigation that resulted in the arrest of 61 distributors (10 from the Crips gang) and the seizure of 600 grams of crack.

San Diego—There has been a considerable reduction in the involvement of black street gangs in crack distribution and related assaults and murders. This is the result of 35 Narcotics Task Force cases that targeted these gangs for immobilization. One (1) of these also resulted in 100 arrests and immobilized the principal crack gang in San Diego. Crack remains a serious problem in minority enclaves of the city and suburban areas.

San Francisco—Crack continues to be a problem in the San Francisco Bay area. There have been several instances of kilogram-size seizures in San Francisco and Oakland. The Sacramento area has experienced an enormous increase in crack houses and crack seizures. Gang members from Los Angeles have set up distribution systems in Sacramento. Random shootings involving the Crips and Bloods street gangs have occurred in Sacramento.

Seattle—Two (2) cities in the Division have measurable crack cocaine activity: Seattle, WA and Portland, OR. Two gangs, the Bloods and Crips, are attempting to expand their base of operations in these cities. Seattle Police estimate the operation of 50 crack houses at any time and in excess of 100 gang members in the metro area. Portland reports widespread availability of crack cocaine among all ethnic groups.

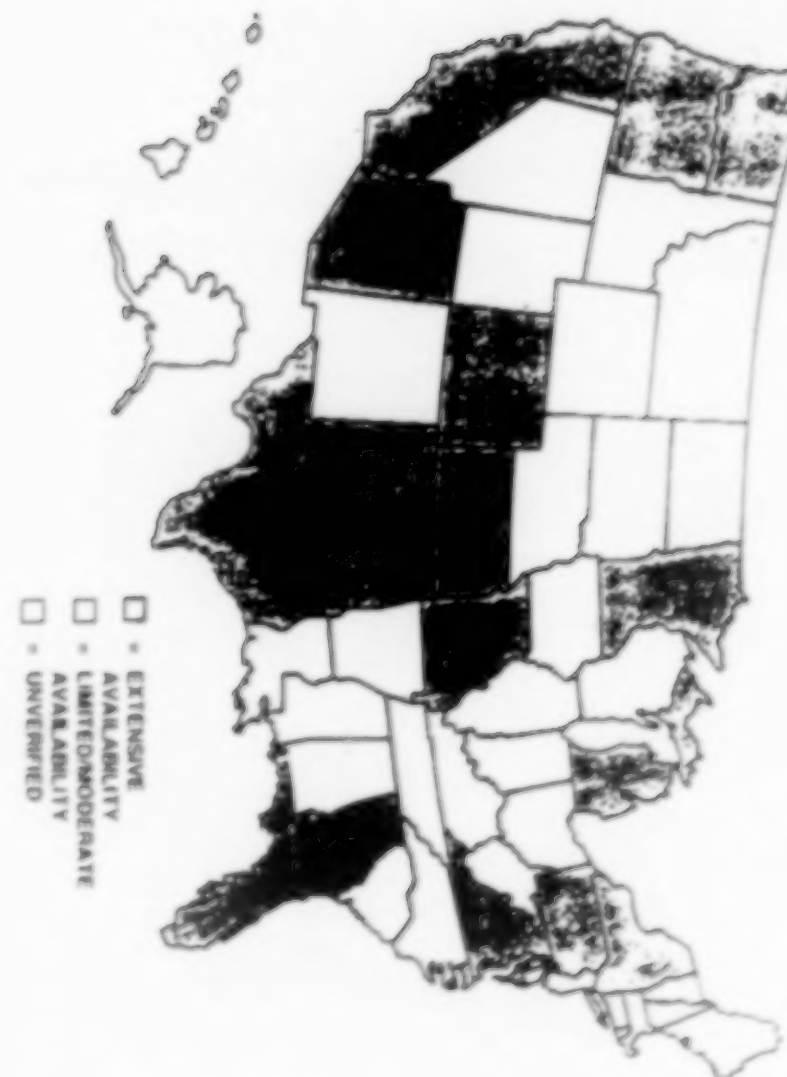
St. Louis—Crack cocaine does not pose a serious problem in St. Louis. The majority of crack arrests and seizures involve low level violators and street level dealers. Crack cocaine is a problem in Kansas City which reports substantial involvement of Jamaican traffickers in the distribution of both crack cocaine and cocaine HCL. Their level of crack distribution ranges from several pounds to several kilograms. Crack houses have been identified in the metropolitan area of Omaha, NE. Ready-made quantities of crack have been imported into the area from Los Angeles.

Washington, D.C.—The presence of crack in the Washington and Baltimore metro areas is not as large scale as first predicted. Currently, there has been some crack activity in the more rural Maryland locations, especially communities with large Haitian and Jamaican migrant worker populations. Haitians and Blacks are the main traffickers in Baltimore City. Crack is readily available in

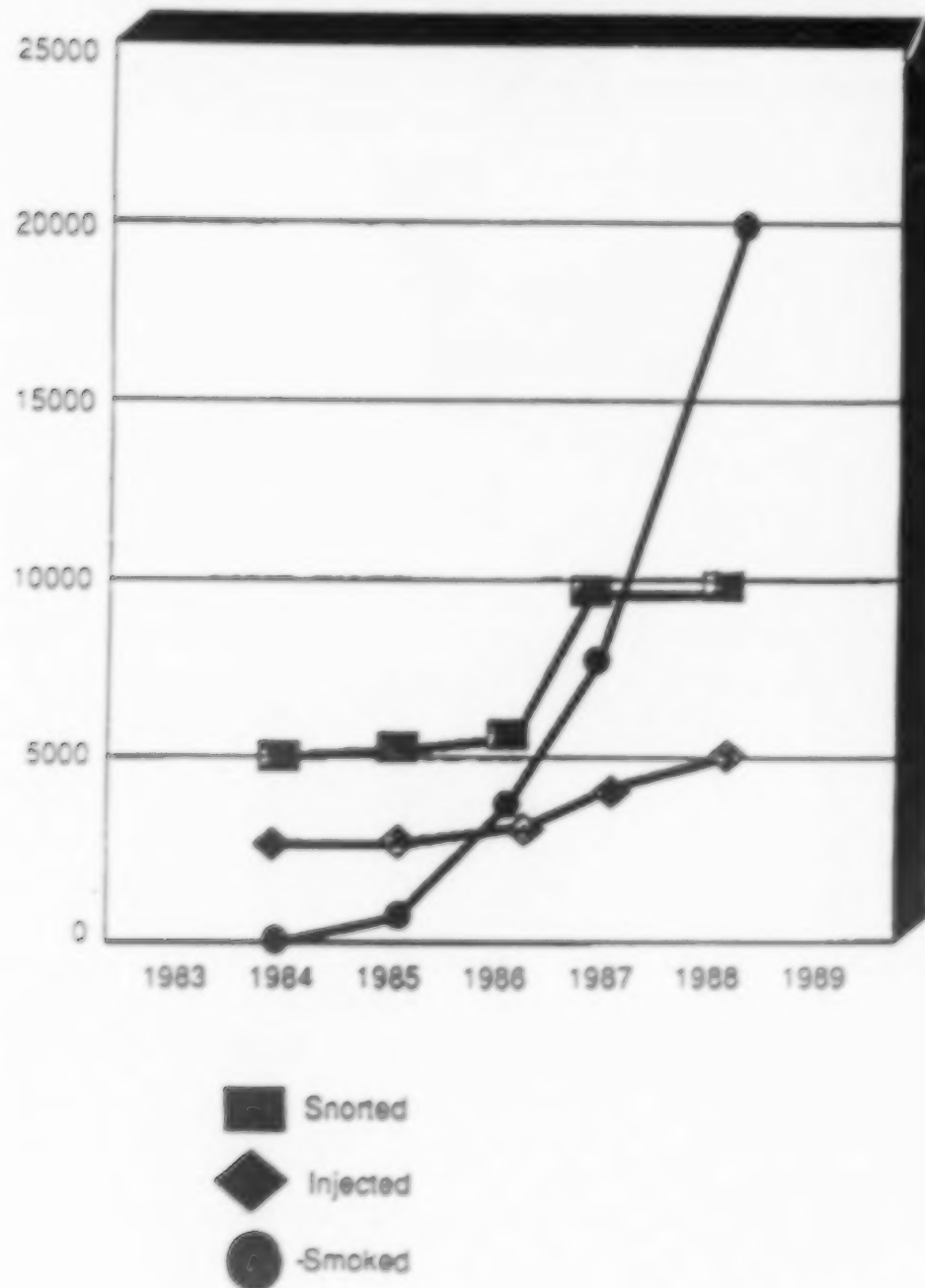
Salisbury and Hagerstown, MD and Martinsburg, WV. The Washington Office has noted an increase in the transportation of crack into National Airport, with nine (9) arrests noted since June 1987. A trend noted by the Washington Division Office Airport Group is the utilization of juvenile couriers, primarily black teenagers, to transport consignments of crack from New York City. This pattern has also been noted in the Norfolk, VA area. Arlington and Alexandria, VA police have raided several crack houses. Several crack arrests have also been made at the Amtrak Railroad Station in Washington, D.C.

A growing number of Jamaican distributors have entered the cocaine trade in Washington, D.C. They have established crack houses in the greater metropolitan area that may also be supplying the Norfolk and Richmond, VA areas. The violence associated with these drug distribution rings is escalating to alarming levels in the Washington, D.C. area with a number of murders attributed to "turf" battles among rival Jamaican and inner-city black trafficking organizations.

CRACK AVAILABILITY IN THE UNITED STATES
CY-1988



Cocaine Related Emergency Room Mentions



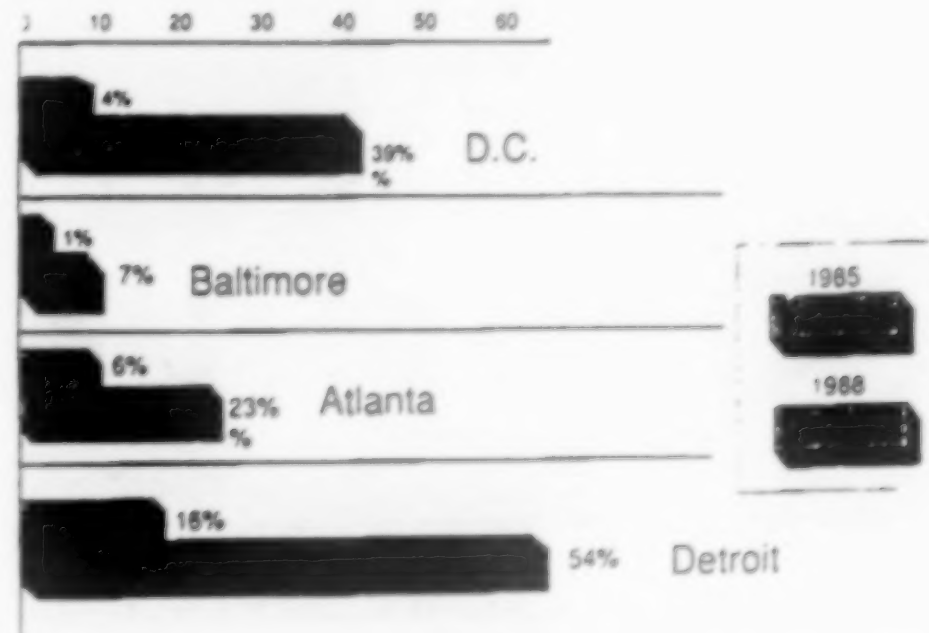
Cocaine and Crack

Population Estimates of

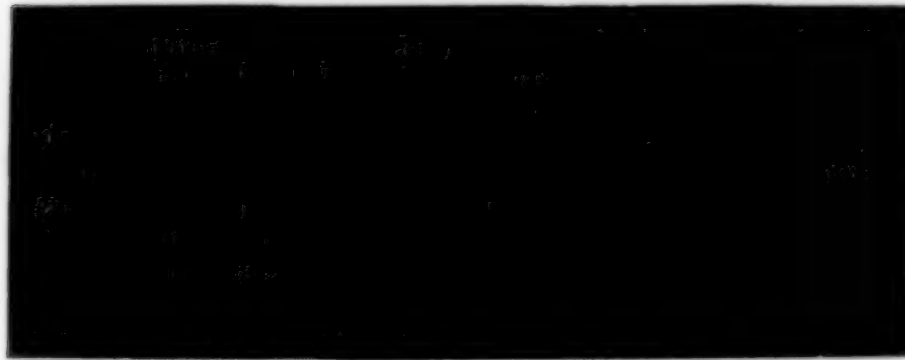
Age:	12 to 17	18 to 25	26 and older	total
Ever used	1.49 million	9.26 million	10.62 million	21.37 million

Crack's Role on Rise in Emergency Room Cases

The percentage of cocaine overdose cases in which crack was the form of cocaine used.



Total Dawn Emergency Room Mentions For Cocaine Smoking



These seven cities accounted for 78% of cocaine smoking ER mentions in 1995 and 81% of cocaine smoking ER mentions in 1997

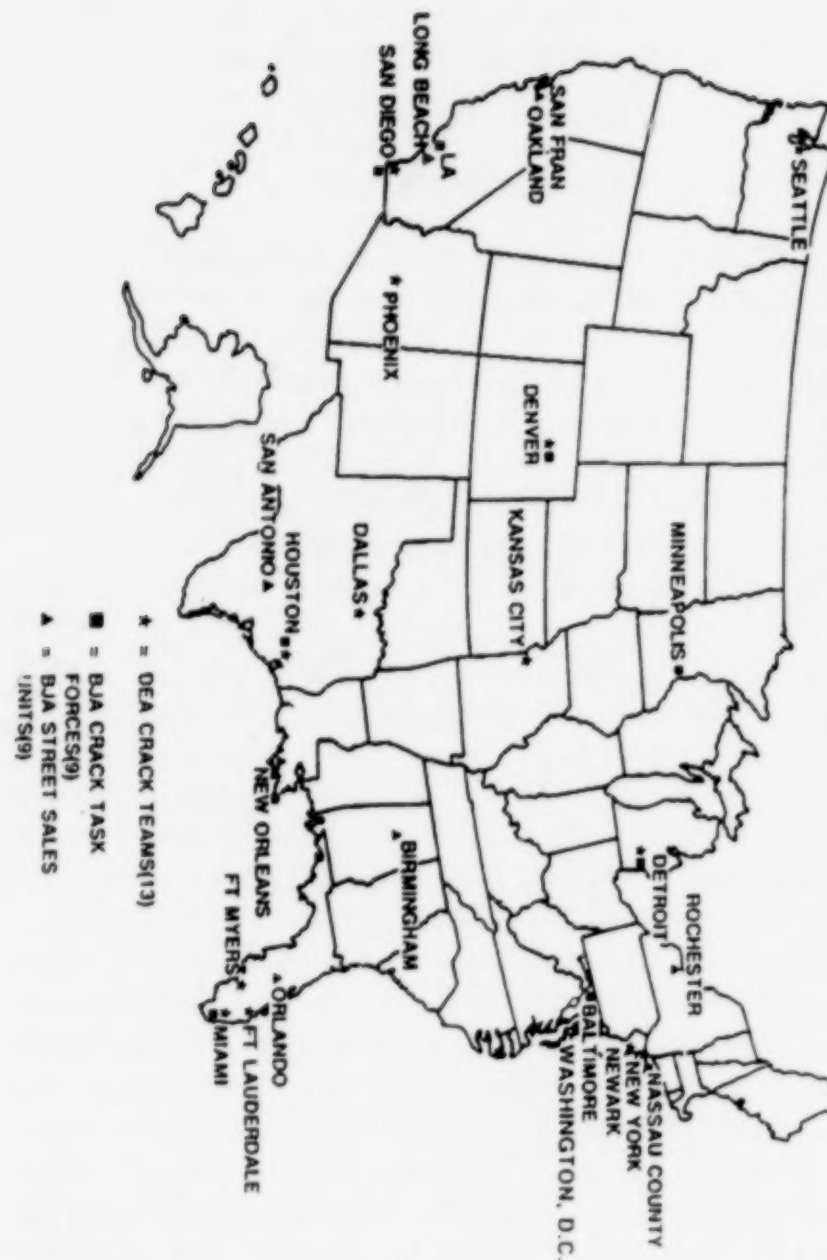
Crips and Bloods^{PS}

Hand Signs





LOCATIONS OF DEA CRACK TEAMS AND BJA CRACK TASK FORCES



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR91-953-JSL

UNITED STATES OF AMERICA, *Plaintiff,*

v.

THOMAS ARLINGTON PRATT, *Defendant.*

TRANSCRIPT OF PROCEEDINGS

Thursday, January 30, 1992

Los Angeles, California

Motion to Suppress

Volume 2

doesn't cause anybody to get prosecuted.

MR. GUNN: Well, except I think, Your Honor, the vast majority of cases that he refers gets accepted. I mean, we can put him back on the stand—

THE COURT: I can't speak to that, but I don't care. That just suggests to me that he is exercising his judgment.

Again, there are cases, of which this is not one, in which I do think the due process considerations are very real. Not just due process, but some others as well. I don't think this is one of them.

MR. GUNN: On this selective prosecution issue, Your Honor—

THE COURT: There I think your statistical basis is insufficient.

MR. GUNN: Insufficient?

THE COURT: Yes.

MR. GUNN: In terms of the number of people?

THE COURT: Yes.

MR. GUNN: I think that is why we need further discovery, Your Honor. I know statistically the chances of getting 23 out of 23, a hundred percent, when the real probability is—

THE COURT: You haven't even shown that; that's the problem.

MR. GUNN: Haven't shown what?

THE COURT: You haven't shown that because I don't know anything about where your people come from, I don't know anything about the difference between your people and people that go to panel people, and I don't know anything about the difference between them and those that have retained counsel.

THE COURT: But that's why I think we need discovery.

THE COURT: No.

What I am saying is, I think your 23 is statistically insignificant. Until you show me something about the population base entirely, I don't think that the 23 out of 23 shows anything.

MR. GUNN: Well, if you were choosing out of a random sample, it would certainly show something.

THE COURT: No, it wouldn't necessarily.

Twenty three in a row out of the 15 million doesn't. Twenty-three in a row out of five million doesn't.

MR. GUNN: Actually, Your Honor, I think statistics—

THE COURT: Then show me that.

MR. GUNN: There are statistical tables on what is called the binomial distribution.

THE COURT: I am aware of that, so show me that. You really haven't. You haven't done anything except that to show that you have 23 in a row.

MR. GUNN: I could try and submit authority that suggests the random sample for at least our office. You have the issue of whether our office is a random sample of the population as whole, but I think, assuming the sample base is our office—

THE COURT: The trouble you have, few just take—and I am not going to dwell on this very long—if you go to a statistician, he will say, I believe, that there is reason to believe that your sample is a very biased sample out of the population.

MR. GUNN: All right; that is an issue.

THE COURT: And then once you said that, he is going to say, "Until I know more about the potential for bias, I can't form a judgment about whether 23 in a row is statistically significant."

THE COURT: But the only way of getting the potential for bias is to look at all the cases outside our office, and that is I think where discovery is necessary.

THE COURT: I don't see why discovery is necessary. That is up to the government. I don't see why that is not up to you at some point. Show something.

Right now you haven't given me sufficient reason to believe that your experience shows anything about the population base.

MR. GUNN: I don't think we have access to as much of a data base as the government does. I mean, what you need to do is, you need to get a list of say all crack cocaine cases in this courthouse during the past year, and I don't know that—I don't know of anyway—the government would be able to get that information through—

THE COURT: I am not even not sure that does it.

I don't know—and I don't know that there is any way for me to find out in the first instance—whether there is a bias in the distribution of crime that says black people use crack cocaine, hispanic people use powdered cocaine, caucasian people use whatever it is they use. I don't know any of those things.

The fact that you have 23 in a row, crack, in truth there being so little reason to believe that it would reflect a bias, there is a considerable burden on you to show that it does.

MR. GUNN: It has to be explained either by the Federal Public Defender gets just black clients—

THE COURT: Maybe that the only people that use crack cocaine are black.

MR. GUNN: That's what I was going to say, or that—but I just would submit—

THE COURT: Or that you are only getting the ones that can't pay for it.

MR. GUNN: Right.

THE COURT: There are a lot of ways to be biased.

MR. GUNN: Right.

I guess what I am suggesting is, I think—I think, at least for purposes of discovery, it is not appropriate to say we haven't—that to just say, well, it is possible that all crack cocaine users or sellers are black.

And I don't think you can say that—

THE COURT: I am sorry, I am done arguing.

The burden on you, which in this court you haven't met, is to show some reason to believe that your sample reflects an illegitimate bias. So far, 23 in a row doesn't show me anything.

Show me a statistician, a bona fide, real person that can say it does, subject to my voir dire—and I do know how to do this—then maybe, but just saying that the public defenders had 23 in a row to me says nothing.

And you have to say something before you are entitled to do any discovery. And 23 in a row is nothing, stand alone.

Does that cover everything that we have today?

MS. DUNNE: The only issue is the last motion, notion to suppress statements. I am unclear on the Court's

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR91-1062(A)-R

UNITED STATES OF AMERICA, *Plaintiff*,

v.

ALBERT JORDAN, *Defendant*.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

On February 24, 1992, this Court heard defendant Albert Jordan's motion for dismissal based upon his allegation that his prosecution in federal court violated his right to procedural due process. This motion was based upon the following grounds:

The referral of defendant's case from Inglewood Police Department to the Bureau of Alcohol, Tobacco and Firearms ("ATF") for possible prosecution in federal court violated defendant's right to procedural due process because the penalties for violations of 21 U.S.C. § 841 and 21 U.S.C. § 846 are higher in the federal system than their counterparts in the California state system.

Defendant Jordan appeared at the hearing with his counsel, Korey House. Assistant United States Attorney Christopher Tayback appeared on behalf of the government.

The Court has considered the pleadings, declarations and documents filed by the parties, and the testimony and oral argument presented to the hearing. Based on the foregoing and for good cause shown, IT IS HEREBY ORDERED that defendant Jordan's motion is DENIED. In connection with this order, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The declarations of Jeff Cochran and Mark Campbell, submitted by the government with respect to defendant's motion to dismiss for selective prosecution are accepted as the direct testimony of those witnesses with regard to defendant's motion to dismiss for violation of defendant's right to procedural due process.

2. The declaration of defendant Albert Jordan, submitted by defendant Jordan is accepted as his direct testimony.

3. Defendant was arrested in connection with this case for possession with intent to distribute in excess of one hundred grams of cocaine base, and the possession and use of five firearms in this case.

4. The testimony of Mark Campbell is credible in that he did not threaten defendant Jordan with a referral for federal prosecution.

5. The testimony of Mark Campbell is credible in that neither he nor any other police officer interrogated defendant Jordan after defendant was arrested.

6. The testimony of Mark Campbell is credible in that defendant was not referred to federal authorities for federal prosecution upon or because of defendant's invoking his Fifth Amendment rights, but rather because of the quantity of narcotics possessed by defendant, number and type of weapons possessed by defendant, and the gang-related nature of the criminal activity of defendant and co-defendant Frank Pate.

7. The testimony of defendant Jordan, to the extent that it conflicts with the testimony of Mark Campbell, is found not credible, and motivated by self-interest.

8. Defendant's criminal conduct was referred from the Inglewood Police Department to ATF Special Agent Jeff Cochran to present for federal prosecution. Special Agent Cochran works out of the Inglewood Police Department as part of a joint Inglewood Police Department-ATF task

force focusing on crimes related to gangs, drugs and firearms.

9. The ultimate decision to prosecute defendant federally was made by the Office of the United States Attorney.

10. The decision to refer the case to ATF was based on the Inglewood Police Department's Narcotics Unit's internal guidelines, in that defendant was determined to be an associate of a gang, possessed a large quantity of cocaine base with intent to distribute, and possessed firearms in relation to narcotics trafficking.

11. The decision of Special Agent Jeff Cochran to seek indictment from the Office of the United States Attorney for defendant's crimes was based on defendant's serious criminal conduct, specifically, defendant's possession of over 100 grams of cocaine base with intent to distribute, defendant's possession and use of five firearms in connection to a drug trafficking offense, and the gang-related nature of defendant's criminal conduct.

12. The federal government and the State of California are separate sovereigns.

13. Any Conclusions of Law deemed to be Findings of Fact are hereby incorporated by reference into these Findings of Fact.

CONCLUSIONS OF LAW

1. Prosecuting agencies have wide discretion in deciding whether or not to prosecute a given case and what charges to seek from a grand jury. *Wayte v. United States*, 470 U.S. 598, 607 (1985); *United States v. Sanchez*, 908 F.2d 1443, 1445 (9th Cir. 1990).

2. Federal prosecution of a federal crime in federal court that could have been or has been prosecuted in state court does not violate due process, even though the defendant may be subject to harsher penalties in the federal system. *United States v. Anderson*, 940 F.2d 593, 596 (10th Cir.

1991); *United States v. Turpin*, 920 F.2d 1377, 1388 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1428 (1991).

3. The federal government's decision to prosecute does not create a constitutional violation provided the decision is not based upon an unjustifiable standard, such as a defendant's exercise of his constitutional rights. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

4. Defendant presented no credible evidence that defendant's federal prosecution or the referral from Inglewood Police to the Bureau of Alcohol, Tobacco and Firearms was based on an unjustifiable standard.

5. Defendant was not prosecuted because he invoked his Fifth Amendment rights.

6. Under the doctrine of "dual sovereignty," a defendant may be prosecuted by two separate sovereigns for the exact same criminal conduct. *Bartkus v. Illinois*, 359 U.S. 121 (1959); *United States v. Figueroa-Soto*, 938 F.2d 1015 (9th Cir. 1991).

7. Defendant is not entitled to be prosecuted by only one sovereign or the other—either the state or the federal government. He can be prosecuted by both.

8. To the extent that any of the Findings of Fact are deemed to be Conclusions of Law, they are incorporated herein.

9. In light of the foregoing, defendant's motion to dismiss and for dismissal of the indictment based upon a violation of defendant's right to procedural due process is denied.

MANUEL L. REAL

Chief United States District Judge

Presented by:

CHRISTOPHER TAYBACK

Assistant United States Attorney

DATED: March 4, 1992

[illegible]

DATE	NAME	CHARGE	COURT NO	IMPRISON YRS	IMPRISON MO	PAGE/SECTION
01/20/89	BARNET, TROY BOLANZO	21 - OBSTIN	CA 89-41			
01/20/89	ARIAS, JESSE	21 - OBSTIN	CA 89-50444			
01/20/89	MARTINO-VILLARIEL, JOSE	21 - OBSTIN	CA 89-50444	61	240	99
01/20/89	GARCIA, MAC NIO	21 - OBSTIN	CA 89-50444	61	162	60
01/20/89	PIEDRA-BIAS, ANABAD	21 - OBSTIN	CA 89-50444	50		
01/20/89	MORA, JOEL	21 - OBSTIN	CA 89-50444	50		
01/26/89	0120, OSCAR GUTIERREZ	21 - OBSTIN	CI 89-79	50		
01/26/89	FERRER, BENIGNO PORTIAGO	21 - OBSTIN	CA 89-79	50		
01/26/89	CEBILLO, FERNANDO	21 - OBSTIN	CA 89-78	50		
01/26/89	SCORRA, GABRIEL	21 - OBSTIN	CA 89-78	50		
01/26/89	EVERETT, TOMMIE	21 - OBSTIN	CA 89-80	50		
01/27/89	WOLFE, DUYLOU LYNN	21 - OBSTIN	CA 89-54	50		
01/27/89	RAMOS, CARLOS	21 - OBSTIN	CA 89-54	50		
01/27/89	JACKSON, STEVEN MONTELL	21 - OBSTIN	CA 89-55	61		
01/31/89	DE LA MORA, JOSE TOMAS	21 - OBSTIN	CA 90-50429	60		
01/31/89	LIZABARRA, ALONSO RIOS	21 - OBSTIN	CA 90-50429	61		
01/31/89	CABO, RAMON ANGEL	21 - OBSTIN	CA 89-50311	50		
01/31/89	CABARES, ALMA GASTON	21 - OBSTIN	CA 89-50311	50		
01/31/89	MORA, EUGENIO	21 - OBSTIN	CA 89-50311	50		
01/31/89	CABARES, MONSIEUR	21 - OBSTIN	CA 89-50311	50		
02/01/89	LEMON, STEPHEN	21 - OBSTIN	CA 88-956	60		
02/01/89	COPEL, MADE PEBERICK	21 - OBSTIN	CA 88-956	50		
02/01/89	GARCIA, DANIEL	21 - OBSTIN	CA 88-983(C)	50		
02/01/89	JACKSON, JONN	21 - OBSTIN	CA 88-983(C)	50		
02/01/89	WOTO, JOSE GUARALUPE	21 - OBSTIN	CA 89-50314	61		
02/03/89	GARFIELD MATTION	21 - OBSTIN	CA 89-50289	61		
02/03/89	PIEDRA-BIAS, ANABAD	21 - OBSTIN	CA 89-50444	60	036	36
02/03/89	MORA, JOEL	21 - OBSTIN	CA 89-50444	61		
02/03/89	RIO, OSCAR GUTIERREZ	21 - OBSTIN	CA 89-78	61	087	48
02/03/89	CEBILLO, FERNANDO	21 - OBSTIN	CA 89-78	61	012	72
02/03/89	ELKINS, LAWRENCE JAMES	21 - OBSTIN	CA 89-123	50	012	
02/03/89	WHITE, PAVANE	21 - OBSTIN	CA 89-123	50		
02/03/89	WHITE, KIMBERLY	21 - OBSTIN	CA 89-10576	50		
02/06/89	SAINT-CLAIR, BRAS	21 - OBSTIN	CA 89-84	61	040	60
02/07/89	EVERETT, TOMMIE	21 - OBSTIN	CA 89-143	50		
02/09/89	LEON, GUERRERO	21 - OBSTIN	CA 89-143	60		
02/09/89	LEON, RAMON	21 - OBSTIN	CA 89-10534	61	240	99
02/10/89	FERRER, ALFRED	21 - OBSTIN	CA 89-107	61	040	48
02/10/89	REYNOLDS, MARK BRIAN	21 - OBSTIN	CA 89-107	61		
02/10/89	DELLVILLAS, LUIS ALBERTO B.	21 - OBSTIN	CA 89-107	50		
02/10/89	FERRER, ALFONSO	21 - OBSTIN	CA 92-53102	50		
02/10/89	ANABAD, FERNANDO	21 - OBSTIN	CA 92-53102	50		
02/10/89	ANGEL, GABRIEL	21 - OBSTIN	CA 92-53102	50		
02/10/89	ANGEL, WILLIAM	21 - OBSTIN	CA 92-53102	50		
02/10/89	COMALIER, EUGEN	21 - OBSTIN	CA 92-53102	50		

[illegible][illegible]

DATE	NAME	CHARGE	COUNT NO	CRIM DISPOS	IMPRISON VRS	IMPRISON MO	PROBATION
03/13/89	GOMEZ, ALVARIO DE JESUS	21 : 0841A1	CA 90-50239	SU			
03/14/89	GRISON, JARVIS JAMES	21 : 0841A1	CR 89-213	CT	070		48
03/14/89	THOMAS, ARTHUR	21 : 0841A1	CR 89-213	BM			
03/14/89	WILLIAMS, HERBERT JR	21 : 0841A1	CR 89-214	BM			
03/14/89	CORREIA, MARK EDWARD	21 : 0841A1	CR 89-214	BM			
03/15/89	ROBERTS, KERRAN EUGENE	21 : 0841A1	CR 89-215	CT			48
03/15/89	WELSON, ELLIEN	21 : 0841A1	CR 89-225	BM			
03/15/89	WILLIAMS, CLINTON	21 : 0841A1	CA 90-50139	CT	160		99
03/15/89	RILEY, JOSHUA	21 : 0841A1	CR 89-508	BM			
03/15/89	FOSTER, BARRETT	21 : 0841A1	CR 89-226	BM			
03/15/89	RILEY, JOSHUA	21 : 0841A1	CR 89-226	BM			
03/15/89	RICO, BRIAN	21 : 0841A1	CR 89-227	CT	120		
03/17/89	CHOW, DAVID	21 : 0841A1	CR 89-227	CT	077		48
03/17/89	LOUPE, STANLEY	21 : 0841A1	CR 89-231	SU			
03/17/89	HARRIS, KEVIN	21 : 0841A1	CR 89-231	CT	024		
03/17/89	TOOKS, CHARLES DAVID	21 : 0841A1	CR 89-231	SU			
03/21/89	SHAW, JESSE	21 : 0841A1	CA 91-10427	SU			
03/21/89	WILSON, ANTHONY	21 : 0841A1	CA 91-10427	CT			
03/21/89	DICKERSON, JERALD WAYNE	21 : 0841A1	CA 89-50381	CT			
03/21/89	VELEZ, ANNA MARIE	21 : 0841A1	CA 89-50381	CT			
03/24/89	GUILLEN, MAGDELENA ALVARO	21 : 0841A1	CA 91-50188	SU			
03/24/89	TAMCHER, JAVIER HINCAPIE	21 : 0841A1	CA 91-50188	BM			
03/24/89	GOMEZ, ALVARIO DE JESUS	21 : 0841A1	CR 89-256	CT	215		60
03/24/89	WANG, CHIM-CHIEH	21 : 0841A1	CA 90-50239	CT	151		60
03/31/89	WELSON, MARRY LEWIS	21 : 0841A1	CR 89-293	SU			
03/31/89	TOOKS, CHARLES DAVID	21 : 0841A1	CR 89-164	CT			
03/31/89	NICKERSON, JERALD WAYNE	21 : 0841A1	CA 91-50427	CT			
03/31/89	PURAT, ABAYATULLAH	21 : 0841A1	CA 90-50051	BM			
03/31/89	ENAJAV, RAD, ABASS	21 : 0841A1	CA 90-50051	BM			
03/31/89	LOPEZ-RETA, RAUL	21 : 0841A1	CA 89-50498	BM			
03/31/89	FERNANDEZ, EUGENIO	21 : 0841A1	CA 89-50498	BM			
03/31/89	RIMES, JOSEPH ALLEN	21 : 0841A1	CA 89-50498	BM			
04/04/89	DICKERSON, JERALD WAYNE	21 : 0841A1	CA 91-50188	CT			
04/04/89	HEARDON, DENNIS EUGENE	21 : 0841A1	CA 91-50188	CT			
04/04/89	MORRIS, PRENTICE BEAN	21 : 0841A1	CA 91-50188	CT			
04/07/89	WAGLE, DWIGHT LYNN	21 : 0841A1	CA 89-50566	SU			
04/07/89	RANDS, CARLOS	21 : 0841A1	CR 89-56	CT	060		60
04/07/89	WANG, CHIM-CHIEH	21 : 0841A1	CR 89-56	CT	060		60
04/07/89	COLERMAN, ELIZABETH	21 : 0841A1	CR 89-293	SU			
04/11/89	BISHOP, LEO	21 : 0841A1	CR 89-293	BM			
04/11/89	WEISBER, DWIGHT	21 : 0841A1	CA 89-50560	SU			
04/14/89	ENAJAVIRAD, ABASS	21 : 0841A1	CA 90-50051	CT	136		60
04/14/89	ALVAREZ-GODOY, MARGARITA	21 : 0841A1	CA 89-50460	CT	121		48
04/14/89	PEREZ, POLINER	21 : 0841A1	CR 89-7098	BM			
04/14/89	VILLA, WILARIO	21 : 0841A1	CR 89-7098	BM			

DATE	NAME	CHARGE	COUNT NO	CRIM DISPOS	IMPRISON VRS	IMPRISON MO	PROBATION
04/14/89	HOUSTON, RAY	21 : 0841A1	CR 89-311	CT			
04/14/89	ROBINS, BARRETT	21 : 0841A1	CR 89-312	SU	121		60
04/14/89	JONES, KEVIN	21 : 0841A1	CR 89-312	SU			
04/14/89	ALVARADO, RICHARD	21 : 0841A1	CR 89-312	SU			
04/14/89	GREEN, RICHARD	21 : 0841A1	CR 89-312	SU			
04/17/89	REMOZA, SERGIO GUTIERREZ	21 : 0841A1	CR 89-359	SU			
04/17/89	TORG, RONALD	21 : 0841A1	CR 89-699	CT			
04/18/89	CIENTIA SALGUERO, JESUS	21 : 0841A1	CR 89-154	CT			
04/18/89	AGOSTA, PRENTICE BEAN	21 : 0841A1	CA 89-50566	CT	240		99
04/18/89	PARRA-VILLA, ELIAZAR	21 : 0841A1	CA 89-50515	SU	240		60
04/18/89	GUTIERREZ, ENRIQUE	21 : 0841A1	CA 89-50515	SU			
04/20/89	MONTANA, OLIVIA MARIA	21 : 0841A1	CR 89-7498	BM			
04/20/89	MONTANA, JANE JE.	21 : 0841A1	CR 89-7498	BM			
04/20/89	GASTELUM, ALVARO	21 : 0841A1	CR 89-7518	OC			
04/21/89	WIGGINS, CHARLES EDWARD	21 : 0841A1	CA 89-50404	CT	083		60
04/21/89	KORANG, ALFRED ASANIE	21 : 0841A1	CR 89-293	MG			
04/21/89	RESTREPO, FLOO MARY	21 : 0841A1	CA 92-50483	CT	360		60
04/21/89	RESTREPO, LUI MARINA	21 : 0841A1	CA 92-50483	CT	320		99
04/21/89	RESTREPO, FADER ANTONIO	21 : 0841A1	CA 92-50483	CT	260		60
04/21/89	MONTANA, CARLOS ALBERO	21 : 0841A1	CA 92-50483	CT	228		60
04/21/89	MARTINEZ, CLAUDIO ROGEE	21 : 0841A1	CA 92-50483	CT	280		99
04/21/89	GARCIA, OLGA MARIANO	21 : 0841A1	CA 92-50483	CT	300		99
04/21/89	GARCIA, JANE MARIANO	21 : 0841A1	CA 92-50483	CT	300		99
04/21/89	CARMONA, JUAN	21 : 0841A1	CA 92-50483	CT	228		60
04/21/89	MONTANA, LOUIS FERNANDO	21 : 0841A1	CA 92-50483	CT	228		60
04/21/89	MALL, RANDY	21 : 0841A1	CR 89-380	SU			
04/25/89	FORTEVILLE, BOLLEN SCOTT	21 : 0841A1	CA 89-50510	CT	360		48
04/25/89	JACKINS, JEFF PHILIP	21 : 0841A1	CA 89-50510	CT	060		48
04/28/89	REMOZA, SERGIO GUTIERREZ	21 : 0841A1	CR 89-359	BM			
04/28/89	REMOZA, SERGIO GUTIERREZ	21 : 0841A1	CR 89-359	CT	121		60
05/01/89	HARRIS, DENNIS LEE	21 : 0841A1	CR 88-935	CT	100		48
05/01/89	ALVARAZ, JOSE LUIS	21 : 0841A1	CA 90-50249	SU			
05/01/89	ALVARAZ, JUAN POSADAS	21 : 0841A1	CA 90-50249	SU			
05/02/89	WHITE, BUTANE	21 : 0841A1	CR 89-123	BM			
05/02/89	PARRA-VILLA, ELIAZAR	21 : 0841A1	CA 89-50515	BM			
05/02/89	GUTIERREZ, ENRIQUE	21 : 0841A1	CA 89-50515	CT	188		60
05/05/89	MALL, RANDY	21 : 0841A1	CA 89-50716	CT	120		60
05/05/89	WASHINGTON, STANLEY	21 : 0841A1	CR 89-380	CT	240		90
05/05/89	BROWN, KEVIN	21 : 0841A1	CR 89-7998	BM			
05/05/89	ANDERSON, JASPER	21 : 0841A1	CR 89-431	SU			
05/05/89	RUFENIT, DWIGHT	21 : 0841A1	CR 89-431	SU			
05/05/89	THOMPSON, EUGEN	21 : 0841A1	CR 89-431	OC			
05/05/89	NAMMONS, CATNY	21 : 0841A1	CR 89-431	SU			
05/05/89	NAMMONS, BARBARA	21 : 0841A1	CA 90-50149	SU			

NAME	CHARGE	COURT NO	CRIM DISPOS	IMPRISON YES	IMPRISON MO	PROBATION
05/05/89 BENTLEY, JOHN	21 :0841A1	CA 90-50149	SU			
05/05/89 BEAVERS, JULIUS	21 :0841A1	CR 89-424	SU			
05/05/89 GRAY, MICHAEL	21 :0841A1	CR 89-429	SU			
05/05/89 WILSON, MICKY	21 :0841A1	CR 89-429	SU			
05/05/89 BISHOP, KEVIN	21 :0841A1	CR 89-429	SU			
05/05/89 BISHOP, NATHAN	21 :0841A1	CR 89-429	SU			
05/05/89 WASHINGTON, TRACY	21 :0841A1	CR 89-432	SU			
05/05/89 HALL, RANDY	21 :0841A1	CR 89-434	SU			
05/05/89 LUI, WING FOK	21 :0841A1	CA 90-50273	SU			
05/05/89 SCOTT, MELANIE	21 :0841A1	CA 89-50537	SU			
05/05/89 PEREZ, APOLINAR	21 :0841A1	CA 89-50541	CT			
05/05/89 PEREZ, APOLINAR	21 :0841A1	CA 89-50541	CT			
05/05/89 BARREJA, JOSE	21 :0841A1	CA 89-50541	CT			
05/05/89 FUMES, ARTURO	21 :0841A1	CA 89-50541	CT			
05/10/89 LARIE, ANDREW E.	21 :0841A1	CR 89-449	SU			
05/10/89 CALLEJON, LYNN	21 :0841A1	CR 89-449	SU			
05/12/89 GUIMONES, JOSE LUIS	21 :0841A1	CA 90-50249	CT			
05/12/89 PEREIRA, WILLIAM CARLOS AKA	21 :0841A1	CR 89-471	SU			
05/12/89 KANJANARASIT, SUREA	21 :0841A1	CR 89-471	SU			
05/16/89 HALL, RANDY	21 :0841A1	CR 89-470	SU			
05/16/89 CHUCKURAM, PHILLIP	21 :0841A1	CA 90-50273	SU			
05/16/89 PENEZ, BERTY	21 :0841A1	CA 91-50027	SU			
05/16/89 HOPE, ERIC SUDAN	21 :0841A1	CR 91-834	SU			
05/16/89 BROWN, EMMIL LINCOLN	21 :0841A1	CR 91-834	SU			
05/17/89 BARNET, MARK CURTIS	21 :0841A1	CR 89-495	SU			
05/17/89 MARSHALL, BOBBIE	21 :0841A1	CR 89-495	SU			
05/17/89 MARSHALL, ANTHONY EARL	21 :0841A1	CR 89-495	SU			
05/18/89 PLASCENCIA-ACOSTA, GABRIEL	21 :0841A1	SACR 89-27	SU			
05/19/89 ANDERSON, JASPER	21 :0841A1	CR 89-431	SU			
05/19/89 HANCOCK, CATIE	21 :0841A1	CA 90-50149	CT			
05/19/89 HANCOCK, CATIE	21 :0841A1	CA 90-50149	CT			
05/19/89 HANCOCK, BARBARA	21 :0841A1	CA 90-50149	CT			
05/19/89 BENTLEY, JOHN	21 :0841A1	CA 90-50149	CT			
05/19/89 GRAY, MICHAEL	21 :0841A1	CR 89-429	CT			
05/19/89 BISHOP, KEVIN	21 :0841A1	CA 89-50711	CT			
05/19/89 THOMPSON, EULES	21 :0841A1	CR 89-432	CT			
05/19/89 WASHINGTON, TRACY	21 :0841A1	CR 89-434	CT			
05/19/89 WASHINGTON, STANLEY	21 :0841A1	CR 89-434	CT			
05/24/89 LUI, WING FOK	21 :0841A1	CA 89-50537	CT			
05/24/89 LIZABARRA, EMMILIO	21 :0841A1	CR 91-824	CT			
05/30/89 ACUIRRE, ADAM	21 :0841A1	CR 91-824	CT			
05/30/89 CARUSO, JERRY	21 :0841A1	CR 89-161	CT			

NAME	CHARGE	COURT NO	CRIM DISPOS	IMPRISON YES	IMPRISON MO	PROBATION
05/30/89 GUIMONES, JOSE JUAN	21 :0841A1	CR 89-471	SU			
05/30/89 PEREIRA, WILLIAM CARLOS AKA	21 :0841A1	CA 91-50027	CT			
05/30/89 CHUCKURAM, PHILLIP	21 :0841A1	CA 91-50027	CT			
05/30/89 LAGO, OSITADINA	21 :0841A1	CA 91-50027	CT			
05/30/89 PENEZ, BERTY	21 :0841A1	CA 91-50027	CT			
05/30/89 SANTURUSQUE, TANARON	21 :0841A1	CR 89-499	CT			
06/02/89 VANG, CHIM-CHIM	21 :0841A1	CR 89-293	SU			
06/02/89 PLASCENCIA-ACOSTA, GABRIEL	21 :0841A1	SACR 89-27	CT			
06/05/89 MORALES, TONY	21 :0841A1	CR 89-544	SU			
06/05/89 MORALES, VIVIAN MARY	21 :0841A1	CR 89-544	SU			
06/05/89 BAUTISTA, DIEGO TERESO	21 :0841A1	CR 89-518	SU			
06/05/89 CORTEZ, CARLOS	21 :0841A1	CA 89-50470	SU			
06/05/89 HENDON, KEVIN ANDRE	21 :0841A1	CA 90-50007	SU			
06/05/89 POE, SHANNON	21 :0841A1	CR 89-524	SU			
06/05/89 PER-LIA, FELIPE LACAYO	21 :0841A1	CA 89-50415	SU			
06/05/89 RODRIGUEZ, ANTONIO AVILA	21 :0841A1	CA 89-50415	SU			
06/05/89 JACKSON, THEOPHILIS EARL	21 :0841A1	CA 89-50571	SU			
06/05/89 SPREWELL, MORVELL LEE	21 :0841A1	CA 89-50571	SU			
06/05/89 BELLIDO, JOSE	21 :0841A1	CR 89-515	SU			
06/05/89 PIERA, EDGAR	21 :0841A1	CR 89-515	SU			
06/05/89 GONZALES, ELVIRA VASQUEZ	21 :0841A1	CR 89-515	SU			
06/05/89 TONG, MERRY	21 :0841A1	CR 89-512	SU			
06/05/89 JORDAN, MERRY LEE	21 :0841A1	CR 89-512	SU			
06/05/89 VASQUEZ, DANIEL	21 :0841A1	CR 89-522	SU			
06/05/89 WILES, GERRICK BARNELL	21 :0841A1	CR 89-523	SU			
06/05/89 VOTO, LORENZO	21 :0841A1	CR 89-523	SU			
06/05/89 REYES, GREGORIO	21 :0841A1	CR 89-513	SU			
06/05/89 VAN JERAN, ARMANDO	21 :0841A1	CR 89-513	SU			
06/05/89 ALVARADO, ANTONIO RODRIGUEZ	21 :0841A1	CR 89-514	SU			
06/05/89 LEMAR, NECTOR ROLANDO	21 :0841A1	CR 89-514	SU			
06/05/89 FLORES, VANESSA MOELLER	21 :0841A1	CR 89-521	SU			
06/05/89 BARRIENTOS, JULIO	21 :0841A1	CR 89-521	SU			
06/05/89 DAVISON, SHELLE YVONNE	21 :0841A1	CR 89-528	SU			
06/05/89 SPANGLING, LOVELLA GEAR	21 :0841A1	CA 89-50408	CT			
06/05/89 SPANGLING, SAMUEL GEORGE	21 :0841A1	CA 89-50408	CT			
06/05/89 OLIVER, CLIFFORD	21 :0841A1	CR 89-169	CT			
06/05/89 ALVILLAZ, DANIEL	21 :0841A1	CR 89-169	CT			
06/05/89 BARNET, MARK CURTIS	21 :0841A1	CR 89-495	CT			
06/05/89 MARSHALL, BOBBIE	21 :0841A1	CR 89-495	CT			
06/05/89 MARSHALL, ANTHONY EARL	21 :0841A1	CR 89-495	CT			
06/05/89 SANTURUSQUE, TANARON	21 :0841A1	CR 89-495	CT			
06/13/89 BERNAL, VETIO	21 :0841A1	CR 89-495	CT			
06/13/89 GONZALES, ROBERT DE FATIMA	21 :0841A1	CR 89-495	CT			
06/13/89 CARRERA, PATRICIA DELCADO	21 :0841A1	CA 91-50257	CT			
06/16/89 SMITH, LAURENCE WARREN	21 :0841A1	CA 90-50594	CT			

DATE	NAME	CHARGE	COURT NO	CRIM DISPOS	IMPRISON YRS	IMPRISON MO	PROBATION
06/16/89	FILLMAN, LAURIE ANNE	21 : 08A1A1	CA 90-50596			151	60
06/16/89	BAUTISTA, DIEGO TERESO	21 : 08A1A1	CR 89-518			054	72
06/16/89	CORTER, CARLOS	21 : 08A1A1	CA 89-50470			057	72
06/16/89	HEWERN, KEVIN ANNE	21 : 08A1A1	CA 90-50007			120	96
06/16/89	POLK, SHAMON	21 : 08A1A1	CR 89-524			027	72
06/16/89	PERALTA, FELIPE LACAYO	21 : 08A1A1	CR 89-50415			060	48
06/16/89	RODRIGUEZ, ANTONIO AVILA	21 : 08A1A1	CA 89-50571			060	48
06/16/89	JACKSON, THEOPHOLIS EARL	21 : 08A1A1	CA 89-50571			151	99
06/16/89	SPREWELL, MORVELL LEE	21 : 08A1A1	CA 89-50571			168	99
06/16/89	BELLIDO, JOSE	21 : 08A1A1	CR 89-515			018	36
06/16/89	PIREDA, ENCAR	21 : 08A1A1	CR 89-515			018	36
06/16/89	COMALES, ELVIRA V. SOUTE	21 : 08A1A1	CR 89-515			060	84
06/16/89	TRUC, HENRY	21 : 08A1A1	CR 89-512			072	72
06/16/89	JORDAN, KERRY LEE	21 : 08A1A1	CR 89-522			034	72
06/16/89	VASQUEZ, DANIEL	21 : 08A1A1	CR 89-522			031	72
06/16/89	TOLO, LORENZO	21 : 08A1A1	CR 89-514				
06/16/89	REYES, GREGORIO	21 : 08A1A1	CR 89-521			034	03
06/16/89	SAN JERMAN, ARMANDO	21 : 08A1A1	CR 89-521			018	02
06/16/89	ALVARADO, ANTONIO RODRIGUEZ	21 : 08A1A1	CR 89-514				
06/16/89	LIMARES, MECTION BOLAND	21 : 08A1A1	CR 89-521				
06/16/89	FLORES, VANESSA MODELLIS	21 : 08A1A1	CR 89-528				
06/20/89	DAVIDSON, SHERLENE YVONNE	21 : 08A1A1	CR 89-544				
06/23/89	MORALES, TONY	21 : 08A1A1	CR 89-544				
06/23/89	MORALES, YVONNE MARCY	21 : 08A1A1	CR 89-544				
06/27/89	MELJUM, HARRY LEVIS	21 : 08A1A1	CA 89-50578				
06/27/89	BLISPO, L. J.	21 : 08A1A1	CA 89-50540				
06/27/89	BRIGGS, GILGORY	21 : 08A1A1	CA 89-50540				
06/27/89	WEISBER, DWIGHT	21 : 08A1A1	CA 89-50540				
06/27/89	HOUSTON, MARY ANN	21 : 08A1A1	CA 89-50148				
06/30/89	MOORE, ELIZABETH L.	21 : 08A1A1	CA 89-50148				
06/30/89	MILNER, LARRY B	21 : 08A1A1	CA 89-50187				
06/30/89	ANDERSON, JASPER	21 : 08A1A1	CR 89-431				
06/30/89	RUSAO, RICHARD LAWRENCE	21 : 08A1A1	CA 89-50476				
07/07/89	WITCHERSON, MARK EDWARD	21 : 08A1A1	CA 89-50463				
07/07/89	SPECK, JOHN ANDREW	21 : 08A1A1	CA 89-50463				
07/07/89	MCNARDIFF, CARLOS ERACLIO	21 : 08A1A1	CA 89-50463				
07/07/89	NABALIN, MUSA I.	21 : 08A1A1	CA 89-50463				
07/11/89	TORRES, MARY BERNA	21 : 08A1A1	CA 89-620				
07/11/89	MART, BILLY NEAL	21 : 08A1A1	CR 89-427				
07/11/89	JONES, MARCEL	21 : 08A1A1	CR 89-427				
07/13/89	RODRIGUEZ, ANTONIO	21 : 08A1A1	CA 90-50057				
07/13/89	LARA, RUPERTO MARCELO	21 : 08A1A1	CA 90-50057				
07/14/89	LAASE, ANDREW E.	21 : 08A1A1	CR 89-449				
07/14/89	CALDERON, LYNDOL	21 : 08A1A1	CR 89-449				
07/14/89	RILLO, KARL ARTHUR	21 : 08A1A1	CA 90-50001				

DATE	NAME	CHARGE	COURT NO	CRIM DISPOS	IMPRISON YRS	IMPRISON MO	PROBATION
07/14/89	MART, BARRIN ERIC	21 : 08A1A1	CA 90-50001			110	40
07/14/89	HERRERA, JUAN ROBERTO	21 : 08A1A1	CR 89-401				
07/17/89	MALLOCK, JAMES M	21 : 08A1A1	CR 89-614				
07/18/89	JONSON, ADNER	21 : 08A1A1	CR 89-614				
07/18/89	PARIAGUA, CARRERA S.	21 : 08A1A1	CR 89-614				
07/18/89	MARIN, MARIA	21 : 08A1A1	CA 90-50213			204	60
07/18/89	VALENCIA, JULIAN	21 : 08A1A1	CA 90-50213			188	60
07/18/89	BORRA, LUIS ALFREDO AVILA	21 : 08A1A1	CA 90-50213			151	60
07/18/89	ORRADO-VALENCIA, HUMBERTO J.	21 : 08A1A1	CA 90-50187				
07/18/89	SUAREZ, LUIS	21 : 08A1A1	CA 90-50187				
07/18/89	BARBANS, SILVIO	21 : 08A1A1	CA 90-50387			168	60
07/18/89	CASASUS, ROBERTO	21 : 08A1A1	CA 90-50387				
07/18/89	PARIAGUA, BARBARA S.	21 : 08A1A1	CA 90-50387				
07/20/89	MARTIN, MARIA	21 : 08A1A1	CA 90-50387			188	60
07/20/89	MARCINS, LINDA	21 : 08A1A1	CA 90-50387			121	60
07/20/89	BLONDA, MERRAN LIL	21 : 08A1A1	CA 91-5582				
07/21/89	QUINONES, JOSE JUAN	21 : 08A1A1	CA 91-5582				
07/21/89	PEREIRA, WILLIAM CARLOS ARA	21 : 08A1A1	CR 89-471			151	04
07/21/89	TORRES, MARY BERNA	21 : 08A1A1	CR 89-471				
07/21/89	MART, BILLY NEAL	21 : 08A1A1	CR 89-620				
07/21/89	JONES, MARCEL	21 : 08A1A1	CR 89-627				
07/25/89	RODRIGUEZ, ANTONIO	21 : 08A1A1	CR 89-627			168	99
07/25/89	LARA, RUPERTO MARCELO	21 : 08A1A1	CA 90-50057				
07/25/89	MAYNES, MARVIN RAY	21 : 08A1A1	CA 90-50057				
07/25/89	ROBINS, BARRELL	21 : 08A1A1	CR 89-641			070	04
07/25/89	JONES, KEVIN	21 : 08A1A1	CR 89-332			262	60
07/25/89	GREEN, RICHARD	21 : 08A1A1	CR 89-332				
07/27/89	LOPEZ, "ERRO"	21 : 08A1A1	CR 89-332				
07/28/89	MARTIN, DANIEL WARNER	21 : 08A1A1	CA 90-50035			060	60
07/28/89	MALLOCK, JAMES M	21 : 08A1A1	CR 89-614				
07/31/89	JIMENEZ-CASTILLO, JORGE	21 : 08A1A1	CR 89-35				
07/31/89	CONA-SALVEZ, LEONARDO	21 : 08A1A1	CR 89-35				
07/31/89	OCMA-SANCHEZ, LUIS	21 : 08A1A1	CR 89-35				
07/31/89	RUIZ, GERMAN VALENTIN	21 : 08A1A1	CR 89-34				
07/31/89	SANTABARIA, SILBERTO	21 : 08A1A1	CR 89-34				
08/01/89	MARCINS, LINDA	21 : 08A1A1	CA 91-5582			120	60
08/03/89	BLONDA, MERRAN LIL	21 : 08A1A1	CA 91-5582			120	60
08/03/89	VILLABONA-ALVARADO, MARIO E	21 : 08A1A1	CA 90-50491			365	60
08/03/89	BENNETT, BRIAN	21 : 08A1A1	CA 90-50491			365	60
08/03/89	MARTINEZ, LUI JAMETH	21 : 08A1A1	CA 90-50491			255	60
08/03/89	MARTINEZ, LUI JAMETH	21 : 08A1A1	CA 90-50491				
08/03/89	WASHINGTON, JIMMY	21 : 08A1A1	CA 90-50491				
08/03/89	RECARVER, MICHAEL DUBARRY	21 : 08A1A1	CA 90-50491			240	60

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR92-336-CBM

UNITED STATES OF AMERICA, *Plaintiff.*

y.

SHELTON AUNTWAN MARTIN, ET.AL., *Defendant.*

DEFENDANT'S OPPOSITION TO GOVERNMENT'S
MOTION FOR RECONSIDERATION OF ORDER FOR
DISCOVERY RE: SELECTIVE PROSECUTION;
DECLARATIONS OF MARLA BELLER AND
COUNSEL

Hearing Date: Oct. 19, 1992

Hearing Time: 1:30 p.m.

Defendant, SHELTON AUNTWAN MARTIN, by and through his attorney of record, Deputy Federal Public Defender, Barbara E. O'Connor, hereby opposes the Government's Motion for Reconsideration of Order for Discovery Re: Selective Prosecution. This opposition is based upon the attached Memorandum of Points and Authorities, declarations of Marla Beller and Barbara E. O'Connor, the motion for discovery previously submitted, and all files and records in this case.

Respectfully submitted,

PETER M. HORSTMAN
Federal Public Defender

DATE	NAME	CRIME	IMPRISON YRS	IMPRISON MO	PAROLE
06/03/89	HARRIS, MICHAEL	21 - 06A1A1	CA 90-50491		
06/03/89	HARRIS, MICHAEL	21 - 06A1A1	CA 90-50491		
06/03/89	MCCARTY, STEPHEN DAVID	21 - 06A1A1	CA 90-50491		
06/03/89	CHILITZA, LORENZO	21 - 06A1A1	SACB 89-37		
06/03/89	LUV, JAMES DOUGLAS	21 - 06A1-3	SACB 89-37		
06/03/89	BARNELL, RICHARD	21 - 06A1-3	SACB 89-40		
06/03/89	LAMBE, THOMAS	21 - 06A1A1	SACB 89-40		
06/04/89	BARNELL, THOMAS	21 - 06A1A1	CR 89-644		
06/04/89	LOPEZ, PEDRO	21 - 06A1A1	CA 90-5016		
06/04/89	STICHELIN, GLENN WILLIAM	21 - 06A1A1	CA 90-50035		
06/04/89	YONAS, JOHN ELIOTT	21 - 06A1A1	SACB 89-34		
06/04/89	JIMENEZ-CASTILLO, JOSE	21 - 06A1A1	SACB 89-34		
06/04/89	GOMEZ SALVET, LEONARDO	21 - 06A1A1	SACB 89-35		
06/04/89	OCUNA SANCHEZ, LOIS	21 - 06A1A1	SACB 89-35		
06/04/89	BULL, GERMAN VALENTIN	21 - 06A1A1	SACB 89-35		
06/04/89	SANTANARIA, GILBERTO	21 - 06A1A1	SACB 89-34		
06/04/89	FOOT, ANGEL MARIA	21 - 06A1A1	SACB 89-34		
06/04/89	RODRIGUEZ, JOSE GARCIA	21 - 06A1A1	CR 89-729		
06/04/89	MELORE, ALVIN AILEDO	21 - 06A1A1	CR 89-729		
06/04/89	ARENO, DOM HILTON	21 - 06A1A1	CR 89-729		
06/04/89	JOHNSON, OLIVER MATTHEW	21 - 06A1A1	CR 89-679		
06/04/89	BILAL, AHMAD ROBERT	21 - 06A1A1	CA 91-50280		
06/04/89	SMITH, A. ANDER LEOH	21 - 06A1A1	CA 91-50280		
06/04/89	SMITH, VICTOR EDWARD	21 - 06A1A1	CA 91-50280		
06/04/89	BOON, CORTIS LEE	21 - 06A1A1	CR 89-704		
06/04/89	SANCHEZ, MANUEL	21 - 06A1A1	CR 89-704		
06/04/89	KEMPER, DAVID LEE	21 - 06A1A1	CR 89-704		
06/04/89	CHOW, DAVID	21 - 06A1A1	CR 89-231		
06/04/89	HARRIS, KEVIN	21 - 06A1A1	CR 89-231		
06/04/89	ROSEY, JOHANN	21 - 06A1A1	CA 90-5016		
06/04/89	TOGO, DONALD	21 - 06A1A1	CR 89-499		
06/04/89	GONZALEZ, MARTHA	21 - 06A1A1	SACB 89-41		
06/04/89	ALANIZ, ARTURO	21 - 06A1A1	SACB 89-41		
06/04/89	BARNIERZ, ANTONIO R.	21 - 06A1A1	SACB 89-41		
06/04/89	CHILITZA, LORENZO	21 - 06A1A1	SACB 89-37		
06/04/89	LUV, JAMES DOUGLAS	21 - 06A1A1	SACB 89-37		
06/04/89	BARNELL, RICHARD	21 - 06A1A1	SACB 89-40		
06/04/89	LAMBE, THOMAS	21 - 06A1A1	SACB 89-40		
06/04/89	LUV, MANUEL	21 - 06A1A1	SACB 89-39		
06/04/89	PALOS, OSCAR ALFREDO	21 - 06A1A1	SACB 89-39		
06/04/89	LAGALAN, EDWARD	21 - 06A1A1	SACB 89-38		
06/04/89	RODRIGUEZ, HECTOR	21 - 06A1A1	SACB 89-38		
06/04/89	BRAM, DENSON ALUMBA	21 - 06A1A1	CR 89-734		
06/04/89	BRAM, TERRY LEE	21 - 06A1A1	CR 89-734		

DATED: October 5, 1992 By
 BARBARA E. O'CONNOR
 Deputy Federal Public
 Defender

DECLARATION OF BARBARA E. O'CONNOR

I, BARBARA E. O'CONNOR, hereby state and declare
 as follows:

1. I am a Deputy Federal Public Defender in the Central
 District of California appointed to represent SHELTON
 AUNTWAN MARTIN in the above-entitled action.

2. On September 30, 1992, I spoke with Chris
 Fernandez, an intake coordinator at Impact House, Pas-
 adena, California.

3. Mr. Fernandez advised me that it was his experience
 in dealing with the treatment of cocaine base addiction,
 that there are an equal number of caucasian users and
 dealers to minority users and dealers.

I declare under penalty of perjury that the foregoing is
 true and correct to the best of my knowledge.

DATED: October 5, 1992

BARBARA E. O'CONNOR
 Deputy Federal Public
 Defender

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

Case No. CR-92-

UNITED STATES OF AMERICA, *Plaintiff*,

v.

CHRISTOPHER ARMSTRONG, *Defendant*.

JOINDER IN SELECTIVE ENFORCEMENT
 DISCOVERY MOTION; SUPPLEMENTAL
 DECLARATION BY DAVID R. REED

TO ASSISTANT UNITED STATES ATTORNEY,
 LAWRENCE CHO, AND TO THE CLERK OF THE
 ABOVE-ENTITLED COURT:

CHRISTOPHER ARMSTRONG hereby joins in all
 selective enforcement discovery motions previously filed
 by co-counsel in the above-entitled matter

Dated: 11/9/91

David R. Reed
 for Mr. ARMSTRONG

DECLARATION OF DAVID R. REED

I, DAVID R. REED, DECLARE AS FOLLOWS:

1) I am the court-appointed counsel for the defendant CHRISTOPHER ARMSTRONG, in the above-entitled matter.

2) I am one of the most active court-appointed attorneys on the Federal Indigent Bar Panel. Most of my practice for the past five years has been devoted to representing indigent defendants in our U.S. District Court, Central District of California (Central District.)

3) As a result of devoting most of my professional career to representing indigent defendants in the Central District, I have handled approximately fifty court appointed cases per year over the past five years (most of these are negotiated cases, not trials.)

4) As a result of spending most of my waking hours in and about the U.S. Courthouse and MDC, I have had many opportunities to not only handle many felony drug cases within the Central District, but, to speak to many other criminal defense lawyers and Assistant United States Attorneys on a daily basis about the nature of their criminal cases within our Central District.

5) As I search my memory, I do not recall ever handling a rock cocaine case involving non-black defendants. Further, on information and belief, I have never even heard of a rock cocaine case prosecuted within our Central District that did not involve black defendants.

8) I have personally handled the following cases, USA vs: (a) ANTONIO JOHNSON CR-92-105-HLH, (b) PATRICK JOHNSON CR-90-497-WDK, (c) ERIC BOBBITT, CR-90-582-RG, (d) ANDRE MANNING, CR-90-624 WMB and CR-90-512 DT, (e) NORVELL SPREWELL, CR-89-519-LEW, and (f) EDGAR ALLEN POPE CR-90-574-CBM (a case the court may remember.)

These prosecutions were all rock cocaine cases and all involved black defendants.

7) I am on the Board of Directors of the Criminal Courts Bar Association Indigent Defense Panel, the association of criminal defense lawyers devoted to representing indigent defendants charged with state crimes within the Criminal Courts Building, 210 W Temple St., L.A. This association handles more state court criminal cases than any other association within Los Angeles County and is composed of over two hundred defense lawyers. As a result of being on this state panel, I do handle a few state criminal matters (not more than 10 cases/year however), but, I talk to many state court judges, prosecutors, and defense attorneys in carrying out my duties as a Director of the Organization. There are many crack cocaine sales cases prosecuted in state court that **do** involve racial groups other than blacks. A major percentage of sales of crack cocaine cases are prosecuted against **Latinos** in the state courts. Yet, in my many discussions with judges and lawyers in the state court, I have never seen any Latinos prosecuted for sales of crack cocaine in our federal court, even when many of these Latino defendants caught selling rock cocaine have already had numerous recent "priors" for selling narcotics and are still on probation. These state cases involving other racial groups are simply not brought over to our federal court.

I declare under penalty of perjury that the above is true and correct. Executed this 8th day of November, 1992, in L.A.

DAVID R. REED

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing,

and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

- ☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.
- ☐ I am ☐ an Officer ☐ a partner ☐ a _____ of _____

a party to this action, and am authorized to make the verification for and on its behalf, and I make this verification for that reason ☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true ☐ The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

- ☐ I am one of the attorneys for _____ a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.
- Executed on _____, 19____, at _____, California.
- I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Type or Print Name

Signature

ACKNOWLEDGMENT OF RECEIPT OF DOCUMENT
(other than summons and complaints)

Received copy of document described as _____

on _____, 19____.

Type or Print Name

Signature

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF

I am employed in the county of LOS ANGELES, State of California.I am over the age of 18 and not a party to the within action. My business address is: 8530 Wilshire Blvd. 404 Beverly Hills, Ca. 90069

On _____, 19____, I served the foregoing document described as _____

- ☐ _____ on DEFENDANT in this action
- ☐ by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.
- ☐ by placing ☐ the original ☐ a true copy thereof enclosed in sealed envelopes addressed as follows:

Lawrence Cho
personal service 312 N Spring St

- ☐ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at _____, California.

Executed on _____, 19____, at _____, California.

- ☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the office of the addressee.

Executed on _____, 19____, at _____, California.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

DAVID R. REED

Type or Print Name

Signature

PLAINTIFF'S EXHIBIT: THESE DOCUMENTS WERE RECEIVED FROM
THEY WERE RECEIVED BY LAWYER AND NOT BY SELF
FILED IN CASE NO. _____ IN THE COUNTY OF _____

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CR92-336-CBM
Los Angeles, California

UNITED STATES OF AMERICA, *Plaintiff,*

v.

CHRISTOPHER LEE ARMSTRONG, ROBERT ROZELLE,
AARON HAMPTON, FREDDIE MACK AND SHELTON
AUNTWAN MARTIN, *Defendants.*

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE CONSUELO B.
MARSHALL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:
LOURDES G. BAIRD, ESQ.
United States Attorney
ROBERT L. BROSIO, ESQ.
Assistant United States
Attorney
Chief, Criminal Division
LAWRENCE CHO, ESQ.
Assistant United States
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Los Angeles, California 90012

For Defendant Armstrong:
PHILIP R. JOHNSON,
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Moreno Valley, Ca. 92557

For Defendant Rozelle:
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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

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For Defendant Martin:
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Los Angeles, California
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United States District
Court
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Room 442A
Los Angeles, California
90012

Transcriber:
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San Diego, California
92122
(619) 453-3325

LOS ANGELES, CALIFORNIA,
SEPTEMBER 8, 1992, 8:27 A.M.

(Call to order of the Court).

MR. CHO: Good morning, your Honor, Lawrence Cho on behalf of the United States. With me at Counsel table is Detective Mark Campbell.

MS. O'CONNOR: Good morning, your Honor, Barbara O'Connor, appearing on behalf of Shelton Martin who is also present in court.

MR. LANNEN: Good morning, your Honor, Timothy Lannen, appearing on behalf of Aaron Hampton who is present in custody.

MR. WALSH: Good morning, your Honor, Joseph Walsh on behalf of Robert Rozelle, who is present.

MR. JOHNSON: Good morning, your Honor, Phil Johnson representing Mr. Christopher Armstrong on behalf of Julie Ireland, who is not here this morning.

THE COURT: Good morning. The matter that is before the Court this morning is a motion—motion for discovery, or in the alternative to dismiss for selective prosecution and also there is a bail review for Mr. Armstrong, and we do have a representative from pretrial present. Can I have you state your name for the record, please?

MS. REEDER: Good morning, your Honor, Jill Reeder for pretrial services.

THE COURT: Thank you. I think we will go with the motion first, but let me inquire—the last filing that I have on this motion is the Government's opposition that was filed on August the 11th—anything filed since that time? There are joinders, but I'm not referring to those, actually—

MS. O'CONNOR: Nothing beyond the joinders, your Honor.

THE COURT: No reply.

Now, in the Government's opposition they cite—I guess at the time—the most recent Ninth Circuit case in this area that talks both about the burden or showing that the defendant must make in order to even get the discovery that's requested, as well as the standard to be used for purposes of the dismissal. And I—maybe Defense could just respond to that case, and does this case meet that standard, et cetera. And whether or not there is—has been another case decided—or other cases decided since that one. Defense?

MS. O'CONNOR: Your Honor, not that I am aware of, but as far as the *Bourgeois* case, our position is that it's certainly a different factual scenario. Where the police in *Bourgeois* were focused on a specific gang for a short period of time, and I think in the quotation that the Government includes, the court holds the Government need not provide discovery on selective prosecution simply because law enforcement focuses for a short time on a racially homogeneous group—namely the targeting of one gang to the exclusion of other equally culpable gangs.

In this case, what we would argue is that the focus is on one race, it is not on one specific gang for a short period of time, and I think the evidence that we did present in terms of the Federal Public Defender's office's experience, over the course of 1991, indicates that the Defendants brought over here for prosecution in Federal Court are exclusively black—

THE COURT: These cases were filed between the time period of 1989 and I think through 1991, and of course this case was indicted in 1992, is that Counsel's position?

MS. O'CONNOR: That's correct, your Honor, and I do not have the information over the course of 1992 that I had opened to present to the Court, and I had also hoped to have some state information which we have had difficulty obtaining—which actually impacts our request for discovery, because it is considerably more difficult for us to obtain information from law enforcement, and statistics that we believe must be available simply by the nature of the U.S. attorney's office prosecution. There must be statistics, there must be policies—Officer Campbell worked in the neighborhood that is concerned here and obviously all of these defendants are black.

THE COURT: And the Defendant is focusing on those that have been charged with drug offenses?

MS. O'CONNOR: That's correct, your Honor, and specifically as to Mr. Martin, we would—what we're seeking is to know the policy that results in an individual like Mr. Martin being brought over from the state for Federal prosecution, namely an individual who does not have a prior drug sale arrest, which I think—it has been my experiences the typical justification that the U.S. attorney's office offers for bringing people over—these are repeat offenders, et cetera—it doesn't have anything to do with race.

Well, Mr. Martin does not fall into that category and it seems no reason to bring him here from state court other

than this sweep of black males in their twenties coming over here.

THE COURT: Anything else that you wish to place on the record concerning the motion?

MS. O'CONNOR: No, your Honor.

THE COURT: Okay.

MR. JOHNSON: Your Honor, may I be heard for a moment?

THE COURT: Certainly.

MR. JOHNSON: I concur with everything that Ms. O'Connor stated—I would just like to draw the Court's attention perhaps to the distinguishing facts between *Bourgeois* and the instant prosecution.

In *Bourgeois* the court found that the applicant's claim was too narrowly focused. He was the victim of a two-day gang sweep in that particular area.

The court reviewed the entire prosecution of the specific charge—with which the defendant was charged at that time—for a two-year period, and noted that the defendant in that case did not cite that the other 140 cases that he was similarly charged—that they were similarly charged with were in fact selective prosecution because he didn't even cite that any of those were black—black defendants versus white defendants. The court noted that he was only the object of a two-day sweep which apparently picked up everybody of one race in that particular time period.

On the facts—I think—this case could be distinguished because the court—I think—recognizes here that we have a range of data that goes over an entire period of a year, all involving the same kind of charge, and all—

THE COURT: You are referring to that information that's—or exhibit—that's attached to the—Ms. O'Connor's papers?

MR. JOHNSON: Yes—yes, your Honor.

And I think that *Bourgeois* would be easily distinguishable on that basis alone. In other words, the court went on

to say that the relevant inquiries, the history of prosecutions over a reasonable period of time—and what *Bourgeois* is talking about is a two-day sweep. The court by—I think—it said that this isn't long enough, and that perhaps on that basis alone the court's focus would be just on that and *Bourgeois* would not be heard to say that this present case would fall under that ambit. I just wanted to suggest that for the Court.

THE COURT: All right. Mr. Lannen?

MR. LANNEN: Yes, your Honor. I think that in addition—the question that comes up—that *Bourgeois* asks for is a showing—what we're missing—that is—is a showing of similarly situated non-black felons, and I think the point is—or the question is at what point does the burden switch to the Government to show that there is no policy. I think it's common knowledge—we all know as attorneys—that literally dozens of these cases everyday are filed in state court for street corner or even mid-level cocaine or crack selling.

And why is Mr. Hampton, for instance my client, who the Government even alleges in the indictment is a runner quotes—puts in quotes—that he is a runner, meaning a low level individual in a—in drug trafficking and who if were filed in state court could get a maximum of approximately ten years, of which he would serve five, why is he brought over to Federal court and the Government seeks a life term without possibility of early release.

That's the real question here—as to why some are brought over for the same offense—literally the same offense, this is a common trafficking offense, and brought into state court with—where the sentencing is so obviously unequal for the same conduct, and I think that by—and again, the question is—Ms. O'Connor in the public defender's office in showing that literally every case that they have handled, in the course of a year or more, is black, then what more can we do—or at what point should

the burden be put on the Government to answer the question of why individuals are being selected to be brought over to Federal prosecution for the same offense.

MR. WALSH: And your Honor, Robert Rozelle joins in the motion and just adopts the arguments that have been previously set forth. Thank you.

THE COURT: All right. Government's Counsel may respond.

MR. CHO: Your Honor, I don't have much more to add to the papers that I—that have been filed—unless the Court has any questions. I just want to respond very briefly that *Bourgeois*—the Court has read the opinion—the opinion is sweeping. The language is sweeping. It is certainly not a case that—I think it should be limited to the facts presented before it. In addition, I think that the facts before it are quite similar to the facts in this case and the language that was used, I think, is highly applicable. Other than that, your Honor, if the Court has any questions I'll be happy to answer them.

THE COURT: My impression in reading *Bourgeois* is that in that case the Government did offer some evidence to support or to—in contradiction to the allegations that were being made by the defendant. In this case now the Government hasn't offered any explanation at all as to why, based upon the statistical data that's been provided by Ms. O'Connor, that it does appear from looking—we have over 20 persons ranging from 1989 through 1992 if we include this case—being brought from state court to Federal court for these drug offenses, all of whom are black.

It's—as I said, my reading of *Bourgeois* would indicate that—in that case the Government did offer some explanation for why—in this case the Government offers no explanation. That's one difference that I see.

MR. CHO: With regards to an explanation, your Honor, I think in *Bourgeois* the elements are still—were still not—

quite lacking—I don't think *Bourgeois* was the situation where the defendants made—or the movants made even a prima facie showing or any kind of showing—the Government successfully rebutted that by introducing any sort of evidence or explanation.

Certainly the explanation in *Bourgeois* was noted and in this case, your Honor, there is no real explanation—I can't explain why the public defender's office has only encountered black defendants and crack cocaine cases—I would have no explanation for that. But certainly I can say that there is no racial motivation of any sort that I am aware of as to why we brought this case versus any others. Certainly I can also say, your Honor, that there is absolutely—I have absolutely no knowledge whatsoever concerning the Government's use or discriminatory intent in bringing those crack cocaine cases—or for that matter in bringing this one. Certainly I also haven't seen any evidence or any allegation even that the Government has acted unfairly or has prosecuted non-black defendants or failed to prosecute them—that is—declined to prosecute in the language of *Bourgeois*—prosecute—failed to prosecute similarly situated non-black defendants.

There is just no situation or no showing of that whatsoever and that has been the necessary element and requisite long before *Bourgeois* was established, that is—that's been case law and Ninth Circuit law for many, many years prior to the decision of *Bourgeois*.

Any other questions, your Honor?

THE COURT: No other questions.

MR. CHO: Thank you.

THE COURT: The Court would grant the motion—the discovery part of the motion—I think that the Defense has made adequate showing in this case that would require the Government to at least turn over policy statements and statistical data that's requested in the motion itself.

The Court sees it different than *Bourgeois*, in that in this case we do have something more than mere allegations.

Bourgeois was a mere allegation case. Also we have a time period that is quite a lot longer than in *Bourgeois* and as one Counsel said, *Bourgeois* focused on a particular gang without any statistics. I don't know this for a fact, but I assume that most of the members of that particular gang would have been of that same ethnic group, so therefore those who were arrested as a result of the investigation probably would have been the group.

In this case, we have a fairly general charge—one that we see regularly in this courthouse—and whether it's coincidental or not, that out of the group that the public defender—that Ms. O'Connor provides us information on—all of them happen to be of the same racial group.

I think the number is adequate that would at least require the Government to provide some explanation. The time period is such that would require some explanation. The charges are the same or similar, and the race is the same in each case.

The Court grants the discovery part of the motion, and does not rule at this point on the motion to dismiss. I assume what will happen is once the Government provides the statistical data then the Defense—if it deems appropriate—will then supplement the motion by providing the Court with more information.

Now, the question is how much time it's going to take the Government to collect the data. I'm not sure if the data has already been collected in this regard or if it's something that you have to start from the beginning.

MR. CHO: Your Honor, as I indicated at the last hearing there is no data collected or retained by the U.S. attorney's office with regards to the race of defendants or the types of offenses that certain races have been prosecuted for, versus having not been prosecuted for, and so I can make some inquiries—some additional inquiries and I will, of course, but to my knowledge at this point—in previous motions that have been filed of this nature in

other cases, we simply don't have that sort of data or collection of information with respect to certain prosecution of certain races and people.

THE COURT: I assume that one approach might be—and the Court can certainly give some guidance and make additional rulings if Government's Counsel requests—is that we could take a certain time period—there must be information, whether it's compiled or not, on how many people have been charged, how many cases have been transferred from state court to this court for a particular charge during a certain time period, and then the racial identity of those persons and any other background information that the Government would have that you might want to argue that it's clear that this isn't race-related, but it is based upon some other criteria, such prior convictions of a certain type, prior criminal records of a certain type. Age might be a factor. There might be other factors that are considered—and then on the other hand, maybe it's the Government's position that none of these factors are considered in making this determination—I don't know. But what I was indicating is that to the extent that we need to limit it to a certain time period, to certain charges, to cases that have been commenced in state court and then brought to this Court—we might only be talking about cases that were actually filed in state court and those—state charges were dismissed and then new charges—and then charges filed in the Federal court. So the Court can give some guidance in terms of what group we're talking about to give the Government a starting place and then you would probably be in a better position to indicate to the Court how long it would take just to compile the information.

I'm sure that their—that racial identity is disclosed somewhere in some of this information, so while you might not keep a record of race—broken down by race—I would assume that race is noted somewhere in the police

report or in some of the other information that's available to the Government.

But I would like to hear from the Defense now as to the group that we're talking about, so that the Government will know where to go in terms of looking for this data. What time period do we want to focus on—is it the period from 1989 through 1922? '89 was the earliest cases filed, in the information that was provided. Are they all cases that were actually filed in state court, charges then dismissed and refilings in Federal court, and the charges that we want to focus on. Are they just generally narcotics cases, or are they just cocaine base cases, some specifics.

MS. O'CONNOR: Your Honor, we would be particularly interested in the cocaine base cases which seem to engender what we perceive as this racial selectivity. I—in my motion—laid out the information that I thought would be helpful—useful to us and useful to the Court in determining if there was in fact a pattern of discrimination, and that would include—I think the most—perhaps the easiest way to analyze it would be to use the same time period that we have provided information for from the U.S. attorney's office, and I can indicate to the Court that what we did was use the paralegals to go through the case files and obtain this information on the racial identity of the defendants, the charges—the state charges and there seemed to be no other pattern than race in indicating why these people were brought over here instead of remaining in the state.

THE COURT: So the time period is 1989 to '92. The charge is cocaine based and the—they are all cases that were originally filed in state court and then subsequently refiled in Federal court?

MS. O'CONNOR: Yes, your Honor. And that would include also cases where individuals—and I have myself experienced this with clients—are arrested and kept in state court on a parole violation—done their period of time in

state court and then are brought over here for further prosecution.

THE COURT: Are you suggesting that no state charges were filed against those persons—

MS. O'CONNOR: No, your Honor, I am suggesting state charges were filed, but they were in the nature of parole revocation based on the arrest.

THE COURT: In other words, there were those cases where the charge that was filed here was not the same charge filed in state court—

MS. O'CONNOR: Correct, your Honor—

THE COURT:—some different charge was filed in state court and then the cases were charged as a drug violation.

MS. O'CONNOR: That's correct, your Honor. I believe that is not uncommon. It is the same transaction as the—provides the basis for the parole revocation but then is charged here as the drug offense.

THE COURT: Do any of the other Defense Counsel wish to be heard on what group we're talking about, so that the Government will know what to look for in trying to get this information?

MR. LANNEN: Well, I would agree with Ms. O'Connor on all of the criteria except maybe—thinking out loud—a lot of these cases—I would like it to include all arrests for that offense, not just filings in state court, because often—

THE COURT: When you say all arrests for that offense, what do you mean?

MR. LANNEN: Offense for cocaine and crack—for crack—

THE COURT: You mean where one is arrested by local police agencies—not charged in state court, but—

MR. LANNEN: See, in other words, your Honor, the—in this case I don't—I'm not even sure there was ever a filing in state court. I think that could become deceptive. They were just filed on over here in lieu of state court.

Now, I may be incorrect there. There may have first been a state filing—I'm not aware of one on my client, but—

THE COURT: So again, are you talking about persons who are arrested by the local police and then charged in Federal court for narcotics violations?

MR. LANNEN: Yes, your Honor, so—

THE COURT: Is that the group you're talking about?

MR. LANNEN:—that—because I don't believe that there's—I think in most cases when a case is filed in Federal court there is not first a filing in state court. In other words, they just file it over here. Do you understand? I don't know if I'm—

THE COURT: I understand what you're saying. That they are arrested by the local police—

MR. LANNEN: In this case, for instance—yeah—

THE COURT—for some narcotic violation—

MR. LANNEN: Right.

THE COURT:—and instead of being charged in state court are charged in Federal court, but the only charge being a narcotic violation. Is that the group that you're talking about?

Because if there were some other Federal violation, then it would seem to me that the answer would be that there was a Federal violation, and that's why it's being filed in Federal court. If it's a situation though where there is—

MR. LANNEN: Well, other than narcotics—no, I agree with the Court on that. In other words, right.

THE COURT: And then the group that I think we're talking about is not just any narcotics, but cocaine base?

MR. LANNEN: Cocaine base, yes, your Honor. I would agree with that.

THE COURT: So what you want to add to the group is that—

MR. LANNEN: That is not be—

THE COURT:—they are persons that were arrested by the local authorities on—for cocaine base and charges were filed in Federal court?

MR. LANNEN: Yes, your Honor. As the Court says—that I note—that in this case the Defendants were arrested both by Inglewood Police Department and the Alcohol Tobacco—which is a Federal agency—so I'm wondering if we should include cases in which they were both involved—both state and federal agencies were involved.

THE COURT: Anything further?

MS. O'CONNOR: I just wanted to add, your Honor, that in terms of ease of retrieving the data we began with the charge—cocaine base charges and went backwards from that. I know for example in this case that Officer Campbell and the ATF agent, Jeffrey Cochran have been involved in at least three other cases defendant—black defendants that were brought here to Federal court on cocaine base, so it seems to me the agencies certainly are—have access to one another's data, and in terms—starting from the cocaine base would be easy to track what the defendants are in terms of their race.

THE COURT: Could you comment on whether or not in this case it's your belief, based upon the information that you have obtained—as to whether or not charges were first filed in state court and then charges subsequently filed here. Mr. Lannen thinks that maybe that did not occur—at least as far as his client.

MS. O'CONNOR: I believe he's correct, your Honor.

THE COURT: How about for your client? Were charges—

MS. O'CONNOR: I believe that was also the case.

THE COURT: Charges were not filed in state court first?

MS. O'CONNOR: That's correct, your Honor, although that could have been the case because Officer Campbell

was involved—it could easily have stayed in Inglewood, rather than coming here—and the other cases that I'm mentioning, all of the defendants were brought into Inglewood police—one was kept then in County Jail for two weeks, and then brought over here, and seemingly for no reason.

THE COURT: When you say "for no reason" you mean—

MS. O'CONNOR: Well, certainly there is jurisdiction, your Honor, but what we are wondering is why these individuals and not others.

THE COURT: Anybody—and of the other Defense Counsel wish to comment now on the group that we're talking about?

MR. WALSH: Just as to Robert Rozelle—I don't believe state charges were filed in his case either. I think he was arrested and brought directly to Federal court.

THE COURT: Government's Counsel maybe can respond. Were state charges filed against any of these defendants?

MR. CHO: Your Honor, state charges were never filed in these defendants. As in a lot of these other cocaine base cases that the Court has carved out, oftentimes state charges are never brought—a lot of these cases involving—specifically involving Inspector—Detective Campbell and Inglewood—are part of a joint task force that is a federal and state task force between local police departments and the alcohol—Bureau of Alcohol, Tobacco and Firearms. These are Federal violations—they are part of the investigations into Federal narcotics violations, as well as Federal firearms violations, and that has been the case in this—in the case at bar there have been violations of 924(c) as well as Title 21, § 841(a)(1). With respect—

THE COURT: Were each of these defendants charged with the narcotics violation—I mean narcotics violations, yes.

MR. CHO: Yes. Each of the defendants was charged at least with the conspiracy and with the—with substantive counts and I believe with respect to Defendants Armstrong, Rozelle, Hampton and—actually, all of the Defendants present in this Court are all charged with the Federal gun counts as well. The 924(c) counts—that's the use of a firearm in connection with a narcotics trafficking offense, as was in—well, *Bourgeois* was an ATF case also, local—joint case in which they were going after felons in possession of firearms—it was still a Federal firearms violation.

THE COURT: Anything else that you wish to place on the record in terms of trying to identify the group?

MR. CHO: I do need a bit more clarification, your Honor, so—we have ascertained that the group is cocaine base offenders between the periods of 1989 to 1992, and I'm not quite sure—the Court wants the Government to turn over whether or not the defendants in those cases—or the cases that we've brought federally were black? Is that—that's about all I can get out of it.

THE COURT: No, I think the question was—the question is what was the racial identity or what is the racial identity of all of those persons.

What we are really interested in finding out here—are they all black? The Defendants believe that they are. The Government might produce evidence to show that they're not—that they are a mixed group. So it's not just if they're black, but what is the racial identification of people that fall into the category—and I'm going to define the category a little bit more before we complete the hearing this morning.

But first, if there is anything else—any other question that you're concerned about, or anything else that you want to place on the record, just concerning the group identification—because we started this when I inquired as to how much time you would need to collect the data. I

would assume the larger the group the more time that you need, so once we narrow it to a specific group of people—and you might not be able to tell me today how much time, but within a couple of days I would expect you to be able to tell me how much time it's going to take to collect the information.

MR. CHO: Well, at this point it's certainly just the racial identities of defendants in which the Government has charged cocaine base violations?

THE COURT: I'm going to identify the group—

MR. CHO: Okay.

THE COURT:—a little bit more specifically than I did earlier.

Let me ask Ms. O'Connor. Apparently your office is actually keeping records on the racial identity, is that correct?

MS. O'CONNOR: That's correct, your Honor.

THE COURT: How long did it take to do the initial research—to develop the information that you provided to the Court?

MS. O'CONNOR: I don't believe—

THE COURT: You indicated that you used paralegals and you think what they did was to look through all of the files that you had in your office, identified the charge, the racial group, the time period, et cetera.

MS. O'CONNOR: I believe it took a period of several weeks to do the initial calculation, and there were three paralegals working on it, although they were not working full-time on it.

THE COURT: Now, I raised the question about how long it's going to take because we—our present trial date is October 6th?

MS. O'CONNOR: That's right, your Honor.

THE COURT: And at least one of the Defendants—I think it's Mr. Armstrong who has a bail motion in his papers suggests to the Court—well, this case has been continued and he's been detained for a number of months.

I don't recall specifically now at whose request the case each time was continued and one of you can probably refresh my recollection about that—but this certainly is a request being made by the Defendants—Mr. Armstrong has joined in this motion—obviously it's going to take some time for the Government to obtain the information and then once the information is provided to you then you're going to have to supplement the motions that are before the Court. You have to put it on for hearing—it probably means that we will not be able to keep the October 6th date. I'm not going to continue the trial at this point because, you know, maybe the data won't indicate anything to us but certainly there is a possibility that this case might be continued again and if so this is at the request of the Defense. Each of you having joined in this motion.

And as I said, it's going to take time to collect the data and time to—for you to supplement the motion, for the Court to hear the motion and issue a ruling and that probably means a new trial date. So I just want you to keep that in mind—it's something to think about in terms of—for your individual clients whether or not you feel that this type of information is going to be beneficial or aid you in supplementing the motion that has been made.

Ms. O'Connor, maybe you can tell me if you recall or Government's Counsel can address it as well. How many continuances have there been in this case, and have there—all of them been at the request of the Government or have some been at the request of the Defendants?

MS. O'CONNOR: My recollection—and unfortunately I don't have the initial date here, was that we had initially asked for a continuance but the later continuance was asked for by the Government due to the illness of the informant.

THE COURT: How about Government's Counsel? Do you recall how many continuances there have been, and

whether or not those were joint continuance—stipulated continuances or requested by one or the other side?

MR. CHO: All of the continuances have been by stipulation, your Honor. Certainly I think some of the requests—I think it's fairly evenly split up. If I recall one of them was because Defendant—I think it was Rozelle—had been arrested. It was either Rozelle or Martin was arrested and there was a continuance based on that for additional time. The last continuance was because of Government's confidential informant—but also another reason was because Defendant Rozelle had just been arrested and he would need additional time because trial was set, I believe, three weeks from the date of his arrest at that time.

The first continuance may have been because of the arrest of Defendant Martin. If the Court will recall, initially the Government indicted the case—two arrests were made. Defendant Armstrong and Hampton were arrested at the scene and subsequently Defendant Martin was arrested which he needed a continuance for, and then just—the last Defendant was Defendant Rozelle who was arrested and of course a continuance was necessitated by that.

There were also motions—if I recall—motions to compel discovery which were filed beforehand—oh, I just now remembered also—there was a change of counsel for Defendant Armstrong, which also necessitated additional time for their new counsel.

THE COURT: All right, anything else that you wish to place on the record concerning this motion?

MS. O'CONNOR: Nothing—nothing further, your Honor, other than to ask that the Court clarify what items that we had asked for in the motion will be granted.

THE COURT: I was granting the motion as to all of the items that were requested. It's all just statistical data. But as far as the group is concerned, the Court would order Government's Counsel to supply this information as to

those persons who have been indicted by the Government on cocaine base and a Federal firearms violation, and it's their racial identity that the Court is ordering be disclosed.

The time period—1989 through 1992, and specifically cases in which both state and federal law enforcement officers have been involved, whether it be a case where just state law enforcement was involved with no federal officers being involved or there being a joint state and federal.

If the—it isn't clear from the request—what the Court wants to know is whether or not there is any criteria in deciding which of these cases will be filed in state court versus Federal court and if so, what is that criteria.

That is the problem I think that needs to be addressed, because we do see a lot of the cases and one does ask why some are in state court and some are being prosecuted in Federal court, and if it's not based on race what's it based on? What is the criteria. It could be based on things like prior convictions. It could be because there are federal firearms charges involved—there could be various reasons for it, but I think ultimately that is the question that needs to be answered is what is the criteria—is there any criteria and if there is, what is that criteria?

MR. CHO: Your Honor, when you say the group consists of cocaine base and firearms violations cases—do you mean cases where we brought both counts—both of those charges against those defendants, right?

THE COURT: Yes.

MR. CHO: Okay.

THE COURT: And I would—since I don't know how long it's going to take the Government to obtain the information—if you have those statistics, Ms. O'Connor has indicated for their office they had three paralegals working on it, although not on a full-time basis. She says over a period of several weeks.

I think what I would do is place it back on for a status conference within a week or so and ask at that point that

the Government be able to advise the Court as to how long it's going to take to obtain the information.

Ms. O'Connor.

MS. O'CONNOR: Your Honor, could I just also clarify that we're looking for not only the cases involving cocaine base and firearms, but if they are solely cocaine base as well.

THE COURT: Yes, you—the record reflects your statement. Yes?

MR. CHO: Nothing.

THE COURT: Okay. Anything else?

MR. CHO: One additional matter, your Honor.

THE COURT: Yes.

MR. CHO: The Government requests an opportunity to brief the appropriateness and the case law involving the inquiry into the criteria for the prosecution to be brought. I understand—if I recall, there are certain cases—Ninth Circuit decisions out there that have touched on the issue of whether or not an inquiry into the purposes behind whether certain cases are brought or not is appropriate.

The Government would like to have an opportunity to look up those cases and supply those to the Court.

THE COURT: I'll permit you to provide the Court with some information on it. What I'm going to do is continue it for a status conference, but even though you might file additional briefing on whether it's appropriate for the Court to order the Government to supply the Court with the criteria or not—I still want you to be able to advise the Court as to how long it would take to collect the data.

MR. CHO: Very well, your Honor.

THE COURT: I'll ask Mr. Levario for some assistance in terms of—I'd like to return it to the calendar in about a week for a status conference.

THE CLERK: September 16th, your Honor?

THE COURT: What time would it be?

THE CLERK: Eight o'clock.

THE COURT: Okay. September 16th at 8:00 o'clock is the status conference. Does Counsel have a problem with the time?

MR. LANNEN: I do have an 8:30 sentencing in Judge Keller's court, your Honor. It looks like it will be continued, I think that date—that time is all right.

THE COURT: Okay. I view this as just a status conference for the Government to report to the Court how much time it is going to take for the Government to collect the information, so that I will know whether or not that's going to affect the trial date and how much—what deadline I should set for the Government to provide the information.

Now, Government's Counsel has indicated that he might want to do further briefing on this and if he does so, then the Defense may respond but I don't view September 16th as the date when the Court will resolve that issue because you need sufficient time to do the research and brief the Court.

The data can still be collected. Whether or not it has to be turned over, maybe will depend on what these cases say.

Anything further on this motion—or these motions?

MS. O'CONNOR: Nothing further, your Honor.

THE COURT: I'm leaving the trial date at October 6th.

There is a bail motion on Mr. Armstrong and Counsel may be heard, and I am interested in having Counsel indicate further to what extent Mr. Armstrong was responsible for any of the continuances that have been granted in the case, and also whether or not he did in fact stipulate to the continuance, join in the request or what his position might have been relative to these continuances, and I raise that because he specifically addresses the fact that he's been in custody for a certain length of time and he thinks maybe he'll be in custody even longer. I think he

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CR92-336CBM

Los Angeles, California
Friday, December 4, 1992
2:30 p.m.

UNITED STATES OF AMERICA, *Plaintiff,*

v.

CHRISTOPHER LEE ARMSTRONG, *Defendant.*

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE CONSUELO
B. MARSHALL
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

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LOS ANGELES, CALIFORNIA
FRIDAY, DECEMBER 4, 1992 2:30 P.M.

(Call to order of the Court.)

MR. CHO: Good afternoon, your Honor. Lawrence Cho on behalf of the United States. With me at Counsel table is Miriam Krinsky, Chief of the Appellate Section of our office, and Detective Mark Campbell, Viejowood Police Department.

MR. REED: Good afternoon, your Honor. David Reed on behalf of Christopher Armstrong; he's present in court.

MR. WALSH: Good afternoon, your Honor. Joseph Walsh on behalf of Robert Rozelle, who's present.

MR. BORTMAN: Good afternoon, your Honor. Dave Bortman on behalf of Freddie Mack, who's in custody.

MR. LANNEN: Good afternoon, your Honor. Timothy Lannen on behalf of Aaron Hampton, who's present.

MS. O'CONNOR: Good afternoon, your Honor. Barbara O'Connor on behalf of Shelton Martin who's also present in court.

THE COURT: Good afternoon. The matters before the Court are a motion for reconsideration by the Government and the parties have responded, at least some, to the issues that have been raised by the motion for reconsideration. I'll give you an opportunity to be heard and then the Court will issue it's ruling. It's the Government's motion, so I'll start with the Government's Counsel. I did receive the Government's supplemental declaration of Mr. Robert Wall in support of the Government's motion.

MR. CHO: Thank you, your Honor. Your Honor, I'm going to address basically just some of the factual things that have occurred, and some of the additional declarations that have been submitted to the Court. Additional arguments, I would like to ask leave of the Court. The Chief of Appellate would like to address the Court as well, once I'm done speaking on the legal matters in the case.

To bring the Court up to date, we're here today because there's been a ruling in the matter—as you'll recall, I think it was about a month or two ago—there's a motion set on for discovery and/or dismissal for selective—on the basis of selective prosecution. The matter was briefed—I think all parties in the court are in agreement as to what the law is, and that is that it's up to the Defense to show that the Defendants—that similarly situated Defendants are treated differently, and also to show that there was discriminatory intent—at least some showing under the law. It's a two-prong test and that's been the test since *Wayte vs. United States*, a Supreme Court decision back then. At the time, the facts before the Court were a declaration—was a declaration from the Public Defenders office, and that declaration stated that, approximately twenty-six cases they have represented were crack cocaine defendants, all of them were black, and that was taken from a sample approximately three years back. Based on that, the Court ruled that discovery should be forthcoming, that as a matter of law, that that declaration submitted by the Public Defenders office was sufficient to meet both elements, and the Court remarked in its transcript—in its comments to the Government at the time, that part of the decision was based, of course, on the showing made by the Defense Counsel. Also the fact that there was no explanation made by the Government on why this particular case was brought against these Defendants, and asked the Government to come up with a criteria, also, for the crack cocaine cases that have been brought and at least some sort of explanation, not only as to this case, but as to some of the other cases—crack cocaine cases—that the Government has brought in the past. Based on that, the Court asked the Government—ordered the Government—to produce a listing of all Defendants—excuse me, all crack cocaine cases that have been brought in the last three years, the race of each one of the Defendants in those cases, and an

explanation as to the criteria that the Government used in selecting those cases and bringing those forth.

Now, in the Government's motion for reconsideration, we submitted numerous declarations and other additional facts for the Court to reconsider. First of all—the first and more important thing that has been brought out in the Government's motion for reconsideration, is that the entire premises upon which the Defense has relied—that is their declaration of twenty six Defendants all being black, having been defended by the Public Defenders office, that has now been shown to be faulty. The original declaration stated that—the inference was that all of the Defendants that they have defended in the last three years for crack cocaine were black, that has shown to be false. The Government has provided declarations and shown that the Government has prosecuted in the last three years—just based on a random sampling done in my office—as least seven non-black defendants for crack cocaine. I've learned just today, by speaking to other assistants in my office, that there were four more additional defendants that are being currently prosecuted by our office who are non-black. That is, *United States vs. Do, Tat, Doan*, case number 92-926, before Judge Rafeedie; those are three Asian defendants who are being prosecuted for crack cocaine. Also, *United States vs. Mendoza-Martinez*, case number 92-993, before Judge Pfaelzer. An assistant is prosecuting a non-black defendant in that case for six hundred grams of crack cocaine. Interestingly, in the *Do, Tat, Doan* case—the three Asian defendants—one of the defendants is again being represented by the Public Defenders office, that would be Allie Blanco. That brings the tally—the informal tally by the Government—of at least eleven non-black defendants within the last three years that have been prosecuted for crack cocaine, five of which have been represented by the Public Defenders office and was not included in their listing that was submitted to this Court.

Secondly, the Government has provided, to the Court and to all Defense Counsel, a listing of all of the narcotics cases that have been prosecuted in the last three years by our office—as the Court can see, easily over a thousand cases, and the Government will submit that a showing of twenty-six cases out of these thousand cases, is insignificant when looked at in the totality. Secondly, the Government has submitted to the Court some explanation, and I think has answered the Court's question as to why there is so many crack cocaine cases that involved black defendants, and that is the declaration of DEA Agent Ralph Lochridge, as well as a DEA report that was submitted to the Court. The report stated that crack cocaine is a very, very big problem here in the Los Angeles area, and that part of the reason why there apparently seem to be so many black defendants that are coming forth in these sort of prosecutions, is that that particular type of narcotic is controlled, in the large part, by street gangs, and these street gangs operate out of areas that are very heavily populated with minorities, and so as a result of that, oftentimes, the type of dealers and the type of criminal defendants that are brought forth, are from these street gangs, and these street gangs are, again, a membership that is fairly minority heavy, specifically black African Americans.

Lastly, I'd like to—like the Court to consider this most carefully—I think that the Government has now come forward and provided to the Court, the criteria that the Government has used in bringing crack cocaine cases, and has shown why this particular case was brought, and why this particular case meets that criteria and I think that this criteria shows definitively that race has absolutely no—no part, plays no role whatsoever in the bringing of crack cocaine cases in general, and crack cocaine cases in this particular context—in this particular case. For example, the Government has shown that some of the factors that are

looked upon are the quantity of crack cocaine seized—in this case, over a hundred grams of crack cocaine, spread out over several purchases. That's twice the mandatory minimum amount of fifty grams of crack cocaine necessary for a ten year mandatory minimum.

Another factor, federal involvement in the case—whether or not there are federal agencies taking part in the investigation, whether its a joint investigation. Certainly in this case, as the Court is aware from declarations submitted and previous hearings, the ATF Agents, Bureau of Alcohol, Tobacco and Firearms, was a joint case agent in this matter and helped investigate this case from the firearm standpoint—investigation firearms—federal firearms violations. Looking at the prior—the prior criminal histories of some of the Defendants, again in this case as I submitted in my papers, several of the Defendants have prior felony convictions, some very seriously, others have firearm convictions in the past, at least one Defendant is—has two prior felony narcotics convictions, and as a result of that is facing up to a mandatory life sentence. Another Defendant has a prior narcotics conviction and a violent—violent crime conviction, which would qualify him to be a career offender. Another criteria, the presence of firearms in the case. As shown in the indictment, there are multiple 924-C counts alleging the use of illicit firearms in connection with the narcotics transactions. The scope and the extent of the ring, again, as the indictment shows, is this case involves multiple purchases of crack cocaine and the multiple uses of firearms in those situations. It involves multiple Defendants, various different runners that came about to deliver the crack cocaine.

Lastly, a level a dangerousness—whether or not this is the type of case that is deserving of federal prosecution. Even taking aside the quantity and the use of firearms and the federal firearms violations, there is, of course, the threats that were made to police—to arresting officers.

This is the type of case in which ATF was specifically designed to assist in talking about violent felons, people that are willing to use firearms in protection of their trade, people that do not hesitate at threatening even law enforcement officials at the time of their arrest. These are the types of individuals that the Federal Government is bringing its forces to bear upon and to prosecute.

Lastly, I think that the affidavits and the declarations submitted by the Government agents as well as the state agent, that is, Mark Campbell, and the U.S. Attorney's office definitely show that there simply has been no discrimination as to these Defendants. In other words, regardless of what the discovery may show, these Defendants simply cannot make a showing, cannot make a case, unless they can claim and can show that they were discriminated against because of their race; otherwise, they would have no standing whatsoever. In essence, your Honor; we're sort of short-circuiting the discovery issue by bringing this to light right now before the Court, so that the Court can see that there simply is no race problem involved with this prosecution. The agents and the United States Attorney's office have submitted a declaration telling the Court that race was not a factor whatsoever, that in essence—in fact, race was not even known at the time of the initiation of the investigation. These Defendants were chosen when they came forth and delivered the narcotics, when they met with the confidential informants once the buys were set up. Their identities nor their races were absolutely unknown to the investigation agents when this case was initiated.

Furthermore, the agents have given testimony that many black defendants, in other words, many other defendants that share the same quality, the same discriminative quality, if you will, that is being African American, are not brought federally, they are brought by the District Attorney's office, and so, certainly that cannot be the

reason why these Defendants were prosecuted by the Federal Government in this particular case. And of course, many non-black defendants have been prosecuted by the United States Attorney's office and by federal agencies, as is evidenced by the declaration submitted to the Court. In essence, that showing has negated any possible showing that the Defense may have presented to the Court initially with their declaration. The showing of discriminatory intent—there simply is no evidence here whatsoever, your Honor, of any discriminatory intent on the part of the police official, on the part of investigating agents, the agencies, nor of the United States Attorney's office in this matter, and they cannot—that—at least that prong of the two-prong test that they must meet to qualify for discovery, has now been affirmatively met and disproven.

Lastly, your Honor, I just want to touch very briefly upon the constitutional concerns involved in this case. There is, as I pointed out in my papers and as I pointed out orally to the Court at the last hearing, that constitutional concerns concerning the separation of powers. I have submitted to the Court authorities, that has talked about and touched upon some of the issues that are extremely—of extreme importance when you conduct this sort of inquiry of the type that is at issue here. For example, the Supreme Court has stated that there are concerns of prosecution delay; certainly, that's something that has been experienced in this case.

This hearing, I think, initially occurred back in September of some sort, about that time, its been now three months at the very least of delays that have been on occasion, at least in part, because of these motions. There is the danger of the revealing of law enforcement strategies. Of course, as the Court can see in the documents submitted, we've had to disclose to the Court and to Defense Counsel many of the criteria, many of the factors, that the Government looks upon in deciding what

sort of cases to bring—what sort of—how to allocate law enforcement resources. This, of course, is the sort of information that is—would be of great use to people that engage in this sort of conduct, and would greatly harm the Government in its efforts to continue to enforce the laws. And lastly, there is the concern that this would chill law enforcement efforts to bring these sort of issues to light and run the risk of bringing these—of having to expend resources on this particular issue—runs the risk—I think ultimately, if the Court decides to grant the motion for discovery, and to eventually even grant the motion for selective prosecution, I think the danger there is—we are really, in effect, creating an affirmative action. In other words, what happens if the motions are granted? What actually happens is that any defense attorney in the future can come forth in any case—in any similar case, and base an argument based on just two things, two representations to the Court. That is, one, in that defendant's defense attorney's history, he or she can only recall prosecuting a particular type of defendant, that share the same quality—same ethnic race—that's based upon that and the fact that their client is of that same race. That alone would entitle them to reams of discovery, to delay criminal prosecutions months on end, and that, if the Court were to dismiss the case and find selective prosecution, then that in effect would confer upon those classes of defendants. The defendants were lucky enough to share the same trait of defendants in the past, an advantage that other people wouldn't have. In other words, if the defendants in this case were white, or non-black, they could not bring this motion. Future defendants who are non-black, would not have this advantage. They would come before the Court and they would not have to opportunity to get discovery from the document—from the Government for three years' worth of criminal prosecutions. They would not have the benefit of months of delays in the prosecutive efforts while

witness' memories dimmed and the Government suffers prejudice. Those are the concerns that I would like the Court to bear in mind when it considers the Government's motion in this matter. Other than that, your Honor, I have the declarants—most of the declarants here today if the Court has any questions or wishes to speak to any of them, I'd be more than happy to accommodate.

THE COURT: I don't. At this point, I would direct just a couple of questions to Government's Counsel. As you indicated, there were four things that the Court ordered Government to provide for purposes of permitting the Defendant to conduct further discovery and then to decide if it would be appropriate to file a motion to dismiss for selective prosecution. You have provided the Court with evidence, as you addressed, in the form of declarations and also some statistical data that lists names, charges, various types of information. Maybe you could address—to what extent do you believe that you have now provided the Court with the information that the Court requested? If it's your position that even though you file a motion for a reconsideration, that in filing that motion, or supporting that motion, you have in effect given the Court what the Court requested, you might want to address that. If you believe that you've given some of the things but not all, then you might want to address which of those you've satisfied, which you haven't, and then address the statement as to why you don't feel that the additional information should be provided. I believe that you have probably addressed that by the argument that you just made, but just to make the record clear, you might want to be specific.

MR. CHO: Certainly, your Honor. Let me address the first issue. I'm glad you brought that up because I think that's a very important point. That is, I do believe that the Government has not met, at least in part, the order that the Court placed upon us. That is, the Government has now

provided a listing—what we believe to be a complete listing of all narcotics charges, prosecutions—or rather, indictments—that our office has brought within the past three years. Armed with that information now, the Defense, I think, has the opportunity to go sift through that and find out for themselves whether or not there are crack cocaine cases in which only black defendants are brought, whether or not there are non-black crack cocaine defendants out there that have been prosecuted. They can look through those cases just as easily as the Government can. Those cases are available to the public, they're available to Defense Counsel, and they're available to the Government, but they—

THE COURT: So, you believe that you have complied with number 1, which was a list of every case in the last three years in which the Government charged both crack cocaine offenses and firearm offenses?

MR. CHO: Yes, I believe that the Government has complied with that.

THE COURT: Number 2 was to list the race of each of these Defendants; you have not done that.

MR. CHO: We have not done that, your Honor, but I think, again, the Defense has the same opportunity to go and find out the race of these defendants as the Government does. It would be a very simple matter to go look up the files in the cases, to speak to pretrial services or the probation office to ascertain the races of the defendants involved.

THE COURT: Is it the Government's position that you don't have information that lists the race of these persons?

MR. CHO: Well, not compiled, your Honor. What would have to be done, is each individual case would have to be retrieved back from some stored files somewhere, and looked through to ascertain that. But no, there is no keeping of the races of any defendants as to any crimes in the United States Attorney's office.

THE COURT: And, number 3 was whether each case was investigated by federal, state, or joint federal and state law enforcement authorities. Do you believe that you've provided that information of the lists of cases that you've given to the Court?

MR. CHO: No, your Honor. I don't believe that we've provided that.

THE COURT: Now, is that in—maybe you could respond to why haven't you provided that? Is it because you feel that you shouldn't have to, or you don't have that type of information readily available, or what's the Government's position?

MR. CHO: The answer is both. First of all, in order to do so, it would take the same amount of effort as it would to go and pull each one of these cases individually, and go through and ascertain whether or not they were jointly investigated. The second answer to your question, also is yes. I don't think that that necessarily is relevant in this inquiry. The inquiry is whether or not defendants were prosecuted for cocaine based transactions because of their race. Whether or not it was initiated by the—by local law enforcement, or federal law enforcement, or a combination of both, I don't see how that sheds any particular light on the issue.

THE COURT: Well, I understood you to say—I think I did—that one of the criteria that you would use, would be whether or not it was jointly investigated by both federal and state, and so for that reason, the Court felt that that was an appropriate question for you to respond to. It might be the theory of the Government that when federal agents are involved, then the Government elects to have the cases prosecuted on the federal side as opposed to the state. On the other hand, if it's a case where no federal agents were involved, one might question why is the U.S. Attorneys office involved in the case, and be looking to some answer to satisfy that.

The last category, was an explanation for why the cases were brought by the U.S. Attorney's office. I think in your explanation to the Court, you suggested that you had provided the Court with some, at least, of that criteria. It's addressed in the declarations provided and it was addressed in your arguments.

What is your position as to number 4? Do you believe that you have satisfied that or do you believe that you have given some of the reasons, although you might not have given all of the criteria?

MR. CHO: I have given the reasons that we prosecute cases in general, specifically with respect to crack cocaine cases, the criteria that the U.S. Attorney's office has traditionally and is currently using. I have not broken down for the Court, as I understood the Court to order, each individual case, which criteria it met or as to why each individual case was brought, in other words, a justification for each one of those cases brought in the last three years. I don't think that I provided that.

THE COURT: And just one other inquiry the Court would make—you've addressed the question of the adverse effects that motions of this type, whether granted or not by the Court, the adverse effects that that has on your office as well as those involved in the investigation or getting defendants to trial and so forth, and I'm addressing or responding to your comments about the delay that it has caused. I'll just comment briefly on the delay. It is probably true that this motion has caused some delay in the case, but of course it's true that there have been other reasons for the delay that are not related to this particular motion. I assume that it would be the Government's position that, if it were true that race was a motivating factor for bringing the cases in federal court rather than stay, that certainly at some point someone should require the very exercise that this Court is suggesting would be appropriate.

MR. CHO: Absolutely, your Honor. I don't mean to demean that whatsoever, and certainly if this was a situation where there was any sort of inclining, or any sort of showing that there was some discriminatory conduct involved, then of course, the U.S. Attorney's office would be the first to initiate a full and complete investigation into it and would expend whatever resources necessary, but the reason I submitted the arguments I did was because in this particular case, I'd submit to the Court that the evidence presented was far below than what was required. Let me just tell—submit to the Court that, even if there was some evidence that were to go below the showing required by the Ninth Circuit and by the Supreme Court, if there was—even if there was a suspicion of that amount, let me assure that Court that the Government would take whatever resources—whatever actions necessary to root that out, to investigate that fully, and to determine if that were the case, and cases like that would not be brought.

THE COURT: All right. Why don't I let Defense Counsel respond to the argument that's been made so far, and then I'll permit Government's Co-counsel to be heard as far as any other legal arguments that need to be made.

MS. O'CONNOR: Thank you, your Honor. We would first of all object to the reconsideration on the basis that no new facts have really been shown that were shown previously to the Court. The declarations that were provided were basically individuals saying, "I've looked at myself, and I don't see any motivation here based on race." In the case of Mr. Martin in particular, he fails to meet most of the criteria that was laid out for the Government for bringing a case like this over here to federal court. He does not have that kind of extensive record. There's minimal evidence of his involvement; what evidence there was is probably gone now because there's no informant to testify, yet he remains sitting here in court. The *Bourgeois* case specifically states, and we argued this

earlier, that selective prosecution could be raised by long term targeting of the gang to the exclusion of others. What we're saying here, your Honor, is the Government seems to have information at its fingertips. Mr. Lochridge says, "I know, as a Government expert, that blacks use crack and whites use something else; and Asians use this", yet they seem reluctant to give us the statistics—the reports that he's relied on, so in essence, he says, "Believe me, I'm looking at myself; I'm part of the Government", and what we're saying is, we're not looking for a dismissal at this point, we're looking for discovery. It's a different criteria; we just have to show a collaborable basis for the claim. The individuals in our office that were located by the U.S. Attorney, I think Marla Beller explained in her supplemental declaration, why they weren't in her short analysis. But, interestingly of course, they are minorities as well. The Do, Dat, Doan case—if we are still in the case at all, and of course is another minority and Asian defendant—however, I believe there was tremendous amount of conflict in our office—I think we had to conflict out on all these cases—because the Government seemed to have people from one case informing on another case. In any event, they are all minorities; there's not a white face among them in any of those, assuming that one considers hispanics also to be minority. The discovery, as we stated again, would help us to locate other individuals—the listing from the Government provides all their drug cases, it does not single out the crack cocaine offenses and the Government has argued they shouldn't have to do that, that crack isn't any different, yet they provide declaration saying, "Yes, crack is different", and that's why these people end up all being black defendants.

THE COURT: Let me ask Defense Counsel a question. Is it the position of the Defense that the sentence that's required under sentencing guidelines is different for the crack cases then it would be for other—either cocaine cases or just other narcotics cases?

MS. O'CONNOR: Correct, your Honor, and I pointed out, I think, in my brief that, we are not just seeking some—we're not singling out crack as different, the statute does, and provides that crack is treated much more harshly than cocaine, for example, and as the Court is aware, there are cases on that issue.

Mr. Reed, I believe, lodged with the Court a newspaper article that appeared last week in the *L.A. Times* on the 23rd, analyzing this whole problem, and the distinction between crack and cocaine, and there is a quote from our office and our statistics, as well as Northern District of Georgia, in which sixty-nine out of seventy defendants charged were black. National figures provided by the United States Sentencing Commission indicate ninety-two percent are black in the crack cases and forty-five sentenced for powder cocaine are white.

Mr. Campbell interestingly says he's been involved in cases with all different races, but everyone brought over here has been black, and perhaps if they had indicated for each of these Defendants, why, beyond their race, why they're brought over, we might have more of a rationale. The Government must have some statistics on race, or Mr. Lochridge wouldn't have been able to form an opinion, so we believe they should provide us with the information and then let us provide it to the Court for the Court to decide whether they're looking at race in an impermissible manner, rather than policing themselves. Similarly, they have not provided the information about the joint investigation, and I know there is some case law, your Honor, on selective prosecutions by joint task forces, and what criteria they must have. They have provided an explanation generally for why they bring cases over here. I don't think it's sufficient and I don't think that our burden is as great as the Government makes it at this stage for discovery, your Honor. I submit on that.

THE COURT: Any of the other Defense Counsel wish to be heard?

MR. LANNEN: Yes, your Honor, thank you. Tim Lannen for Mr. Hampton. I just wanted to reiterate first what Ms. O'Connor said, that there is an important distinction in number 1, in that these cases—my understanding is that these cases do not cover what the Government has given the Defense, and not cover crack cocaine only, and that distinction is critical because, as the *L.A. Times* article points out, that basically the nation is becoming aware of what criminal defense lawyers have known—criminal defense lawyers that practice in state and federal court—have known for some time, that the filing of these cases in federal court, the distinction is huge, and in practice, is very racist. That is, that if somebody is filed on over here, as I mention in my declaration as far as Mr. Hampton, for the same substance offense, the sentence is extremely higher, and in fact, in practice it is black individuals who are being brought over to federal court on these offense. I wanted to just comment briefly on the affidavits of the agents. My client, Mr. Hampton, does not come under the—first of all, there are some inconsistencies. The declarations of the agents differ as to what the criteria is. Agent Scheper mentions several general criteria, one of which is that threats had been made to the arresting office by a co-defendant, not by my client; so are we saying that if one defendant in a case makes a comment or a threat—makes a threat to an officer, that all co-defendants in that case are subject to much higher sentences for their offense by being brought over to federal court with the co-defendant? Agent Scheper lists that as one of the general criteria.

Another criteria that is mentioned by all the agents, which I think is deceptive, is that there's a quote "federal firearms violation", but in fact, a weapon is a weapon. It's a federal offense if it's filed over here; it's an offense in state court, as we know, many narcotics cases in states courts have firearms use or firearm allegations, or principal

armed as part of the statute that it's brought under California state law, and there are enhancements for that. So, when the agents say there's federal firearms violations as one of the main reasons cases come over here, that's simply not true, because many more firearm—narcotics involved firearms offenses, including crack cocaine, are brought in state court than are brought in federal court, so that is—I don't believe is an accurate criteria for a case to be brought over here.

Specifically, as to Mr. Hampton, if you judge him against all these criteria, he should not be here, and he is the individual in this case who the assistant—who the United States Government has filed an allegation of mandating a life imprisonment without parole. Mr. Hampton has two non-violent narcotics convictions involving extremely small amounts of narcotics—I'm talking like ten dollars worth. He has no firearms priors of any kind, and as I mentioned in my declaration, if Mr. Hampton were to be prosecuted in state court, he would be subject to approximately six years in custody, whereas, having brought him over here to federal court, they are aggressively—they have already filed a motion for enhancement, which would mandate this Court to sentence him to life without parole.

For that reason, I think that this motion—that is very well—that the Court's ruling is correct on the motion for discovery. One additional thing—there are no allegations, I believe of any of the Defendants here, that they belong in a street gang. There's nothing I see—certainly not as to Aaron Hampton—so what it appears to be, is that the agents have made declarations which basically are conclusions, listing some criteria as to why Defendants are brought to federal court, but none of which hold up in general practice as opposed to state filing or as to the individuals, at least as to my client in this case.

THE COURT: While you're there, I'll just ask you one question. As you look at what has been provided, and the

items that the Court required the Government to provide, what do you think has not been provided within that group or list of things, other than the failure to identify the Defendants by race?

MR. LANNEN: I'm sorry, to identify—

THE COURT: Other than identifying the Defendants by race. The Government concedes that in its list of names that they have provided to the Court, they have not made any identification as to the race.

MR. LANNEN: First of all, your Honor, as I mentioned, and I think importantly, is that number 1, the Court ordered a list of every case in which the Government charged crack cocaine offenses; that has not been distinguished, and I think that's an important criteria. It's not just that they bring cocaine cases over here, that's not true, the powder cases go both ways, so that is an important distinction—an important item that's missing. The race issue, and number 3 I believe, has not been provided, and I don't think number 4 has been provided either.

THE COURT: All right. Any of the other Defense Counsel wish to be heard?

MR. REED: Yes, your Honor, I'd like to be heard. David Reed on behalf of Christopher Armstrong. Your Honor, I think that the news article has been alluded to by Co-counsel, and I'm not sure whether or not the Court has had an opportunity to read that *Los Angeles Times*, November 23—

THE COURT: I haven't, as a matter of fact, as I listen to the Counsel indicating the declarations, I think that there probably are some things that have been filed that I have not reviewed, but I would like to have you address it, then if it's necessary for me to review them, I will.

MR. REED: Your Honor, I think—I would like to lodge it with the Court, but I think that the paramount thrust of the article is that blacks compose 92.6 of the people who

are prosecuted for crack cocaine offenses, and anglos throughout the United States are—compose a percentage of 4.6, and other races .2, and the *L.A. Times* usually does a very good job of investigation. This article was done by staff writer Jim Newton—I know Mr. Newton—and it's a very interesting article. Basically the conclusion of all of the people who have been doing investigation—journalistic investigation in the area, have come to the conclusion that there are much harsher sentences for crack cocaine and that it's racially unequal. It's unfair, the penalties are stiffer, and the law enforcement authorities, for whatever reason, in practice—I don't know why—are just not prosecuting white people for this particular type of offense, and we all know that white people are doing crack cocaine. I'd like to lodge that with the Court, and if the Court wishes an opportunity to read it, the Court—of course the Court is invited to do so—and may I approach your clerk, your Honor?

THE COURT: Let me inquire, did you previously file it with the Court? Because I thought maybe that's what was being represented in the form of a declaration with the article attached thereto, you'd actually filed it, but apparently that's not the case.

MR. REED: That's correct. It has not yet been lodged with the Court.

THE COURT: You may lodge it.

MR. REED: Thank you.

THE COURT: Other Defense Counsel wish to—

MR. REED: Your Honor, the other thing I wanted to say is—

THE COURT: Yes?

MR. REED: I wasn't finished—

THE COURT: Okay.

MR. REED: I also filed a supplemental declaration. I came into the case recently, and basically, I'm sure the Court has read the declaration that I filed, but I have had

some experience both across the street—most of my experience across the street in the state court hasn't been in the sense in actually handling personally a lot of cases over there for crack cocaine, but as a result of being on the executive committee of the bar panel over there, I kind of oversee a lot of different areas within the criminal defense bar, and interact a great deal with the judges, the defense lawyers, police officers over in state court, and I can represent to the Court, and did represent to the Court, that there are many, many cases that are brought in state court involving Latino defendants who are prosecuted for crack cocaine, and as I indicated in my declaration, I have not seen any Latino defendants brought over to the federal court. The only thing I've seen in federal court are black defendants being prosecuted for these cases.

Today's basically the first day that I found out from the prosecution that there are, I guess, two cases, out of a thousand in the last three years, there happens to be two cases that have been brought in the federal court that don't involve blacks. One, I guess, a Latino case, and another case involving Asians. As Mr. Cho pointed out—he kind of was putting the cart before the horse—when he spoke about these two cases. I got the feeling that his argument was more directed at trying to convince the Court not to eventually grant the motion down the road, instead of convincing the Court more or less why the Government hasn't really complied with the discovery request in the first place. Mr. Cho, I think, understands full well that my giving us a list of a thousand cases, and telling us to go down to the clerk's office and pull a thousand files to find out who's black and who's Asian, who's white, it would be virtually impossible because the nature of the information that is included within the case file jackets, really doesn't reflect whether or not the Defendants are black or white. The information which may pertain or go to that issue is not a matter of public record kept within

the file. The probation reports are not located within the files, files in the court downstairs, those are confidential documents, as the Court knows, the pretrial service agency are documents which are confidential, you need a court order to get those revealed. We could go down until the cows come home and never find out who's black and white, with respect to the cases that we pull. Likewise, we could never find out which police agency has investigated those cases, because the police reports and the discovery are not filed in the court file themselves. Those, of course, are given to the private counsel who represented those defendants; however, I might indicate to the Court that the Government has all of that information available to it, the police reports are contained within the files that they have supposedly hidden in these archives. I'm not sure whether or not located within the fields, however, the United States Attorney's office lists the race of people within the files they keep, perhaps the prosecutors that have prosecuted those cases could simply be asked what the races of the people were. Most of those cases are handled by the narcotic division on the 14th floor; I believe that there's not a great deal of turnover or there hasn't been a great deal of turnover in the narcotic division with the United States Attorney's office within the last three years. Yes, they've lost maybe six or seven attorneys, who still happen to be in the area, and they can easily telephone the attorneys and ask them if they recall whether or not the people were white or black.

What I'm trying to impress upon the Court is, it's impossible for us to get the nature of that information and we do feel that—whether or not the law enforcement agency that handled the case is important. Yes, if it's a federal agency that has handled the investigation, and the case has gone federal, that would argue against, in a certain sense, any kind of argument that there may be discriminatory practices, but if they're state police agencies

that have investigated case—state cases which would have normally gone—been filed over in state court, and if these state investigations involve black people, and then, lo and behold; theses state cases—state police agency cases have been brought over to the federal court, that would kind of confirm and corroborate that something—some type of skullduggery may be afoot. Your Honor, we do not feel that it's a great burden on the Government to provide that information.

I note that Ms. Krinsky is present in court; she may be the expert in the field of law with respect to discriminatory practices. I know it's not the Government's intent to bring Ms. Krinsky down to the court in a show—in an inferential show that whichever way the Court may happen to rule, the U.S. Attorney's office may take the case up on appeal, due to the fact that Ms. Krinsky's the head of the appellate division, I know that the Government wouldn't do such a thing as that.—

THE COURT: Of course, it's not a factor for the Court to consider anyway, because regardless of how the Court rules, if one side or the other feels that it needs to be reviewed by higher courts, then that's why we have higher courts.

MR. REED: I was saying to Mr. Walsh, as the argument proceeded, that we know that Ms. Krinsky is in charge of the appellate division, and not the intimidation division. And so, your Honor, I feel that the showing that we've made is that preliminary showing which would mandate the Government to bring forward these statistics; it's not that hard. It's not going to interfere with any kind of Governmental, or rather executive branch powers, whether or not cases are brought in federal court because the DEA investigated them, isn't going to be anything that drug gangs are going to be able to use in order to curtail their activities; they don't know which agencies are investigating them. If a case is a case that involves a gun, that's

going to have—that type of criteria is going to have very little effect if that type of information is revealed to gangs out in the community. Those arguments don't carry a lot of water, and I would submit it, your Honor.

THE COURT: Any of the other Defense Counsel wish to be heard?

MR. WALSH: Yes, just briefly, your Honor. In terms of the statistics that have been provided to us by the United States Attorney's office, those statistics are all of the prosecution's under Title 21, Section 841. I have looked through it and have found five of my former clients that I represented over the past three years, none of those former clients that were listed here were rock cocaine cases. Two of them were heroin cases, and the other three were cocaine in a powder form. So, I'm not so sure that this listing is going to be as helpful as the Government would—has represented it. They have just simply provided us with all the narcotics prosecutions, they have not given us a list of the rock cocaine cases which is really what we were asking for in the discovery motion, so giving us this list is deluging us with all of the files to look through and it's not really narrowing the scope to what the issues are in the case and that is, how many rock cocaine cases there are, and what are the races of the defendants in those cases.

THE COURT: How many of the attorneys involved in the case are Court appointed? Are all of you Court appointed other than the Public Defenders office?

MR. WALSH: Yes, all of us and one public defender.

THE COURT: So, we have four Court appointed Counsel in the case and one Public Defender. It seems to me, and the Government might want to comment on this, that just in terms on who can best provide the information, we have four Court appointed Counsel. If the Court were to charge them with the responsibility of going through the list of cases that the Government has provided to ascertain

the race and whether or not it was a joint investigation, and whether it was a crack cocaine case versus another narcotic, it would be a tremendous expense to the Government. We would have to pay them at the hourly rate—it is a small hourly rate—but, many of our judges are complaining, even now, about the fees that we are paying to the Court appointed Counsel based upon these cases. The Court, of course, has to appoint counsel to represent them if they can't afford to represent themselves, and the fees are quite high. So, I think one factor to be considered, if the information is available to the Government, and it's probably true that you don't keep these races, it's not one of the things that your office would have an interest in, but you could certainly obtain copies of the arrest report and that information would be on the report, and it probably is true that if somebody has to get the information, it would be less costly if the Government were required to provide it then if the Defendants were required to try to obtain it. Whether that is proper consideration or not, I think it is something that should be reflected on the record.

I would ask the Defense to consider whether or not the list of items that the Court ordered be provided in fact, or the things that are needed in order to permit you to decide whether there would be a basis for filing the motion or not, and it is possible that maybe the Court did not list those things that are needed, and also, maybe the list could be reduced somewhat. The Court ordered a list of every case in the last three years, maybe the Defense would be satisfied if it were one year, or even something less than that. You've indicated that the list does not break the charge down in terms of the type of narcotics, that would probably limit the list somewhat if the Government were to provide just the crack cocaine as opposed to all of the various narcotic charges, and I think the Government addresses this in its papers. It appears to the Court that one of the reasons it's important to break this list down just to

the crack cocaine, is because that's what's charged here, but also, if it is true that the sentencing guidelines impose different sentences based upon the type of narcotics, then it would be more important.

One of the arguments that Defendants seem to be making in these tapes is that the reason that you see these cases in state court is that the sentencing guidelines impose such a high sentence compared with the sentence that would be given in state court. For that reason, some decision has been made by someone, we don't know who makes that decision, to bring these cases to federal court so that we could in fact get a life without benefit of parole on a very young person whose background seemably does not equate with that kind of a sentence, but the guidelines permitted, so therefore, if the case is here, and the Defendants are convicted, then the Court must impose that sentence. I'm aware that the cases suggest that just because the sentences are higher in federal court than they are in state, that that's not a basis for the Court assuming, or Defense assuming, or anybody taking the position that the cases have been improperly brought here, so I know that that's not one of the factors to be considered. If it does appear that the cases that are being brought involving crack cocaine, if all the defendants in those cases are black, and none are of other races, or the others—a very small percentage of others—then it does cause one to question what the motivation is. We don't know, because the Government hasn't provided the information, who really does have the responsibility for making the decision, so I would invite the Defense—there might be some way of getting the information that would be less burdensome for whoever is to provide it, by simply reducing the list, making it smaller, not three years, but something less. Specific as to particular type of drug, you suggested that crack cocaine would be appropriate.

Now, I believe that I added in the firearm offenses; I don't believe that the Defendants initially asked that the

list contained both the crack cocaine and firearms. I added the firearms because I think in this case the Defendants were—some of the Defendants were charged with those, and I thought that that was necessary to better analyze this case, but maybe that's not one of the things that you think are important. So, I'll ask the Defendants to think about that, if you want to respond now, you may, and then I would like to hear from Government's Counsel on the other issues that they think need to be considered.

MR. REED: Just give us a second, your Honor. (Pause.)

MR. REED: Your Honor, we've been—we appreciate the Court's suggestions, and that looks like a tremendously helpful compromise, something that's going to help both sides, but in—we've been informally told by the United States Attorney's office, that depending on the Court's ruling, should they order the Government to provide discovery of this nature, that they intend to go up on appeal. If we were amenable to compromising, we would ask the Government would they still wish to go up on appeal, because we don't want to compromise and then end up going—making perhaps, our burden a little bit tougher by compromising, and then being faced by going up on appeal at the same time. In other words, we're willing to compromise—

THE COURT: Your position apparently is, that you think three years is a reasonable amount of time to request for this information as opposed to some shorter period of time?

MR. REED: For example, we could have two and a half years, two and a quarter years, and we'd be willing to give up the nature of the narcotics, just concentrate on crack, and we'd also be willing to give up firearms; that's not the thrust of what we're trying to do. Those are tremendous compromises, but we're not going to compromise if the Government insist on going up on appeal.

THE COURT: All right. Let me hear from the Government's Counsel in response—and, I don't know that

anybody needs to spend a lot of time talking about the compromise, I suggested that that might be one approach, but obviously if it—if that's not going to be helpful, then we don't need to address it.

MS. O'CONNOR: Your Honor, can I just add my two cents before Ms. Krinsky comes in?

THE COURT: Okay.

MS. O'CONNOR: Which is just—I would point out that the U.S. Attorney's office, I believe, has in excess of three, four hundred assistants. We have approximately forty plus in the Public Defenders office, so in terms of resources, they clearly have the ability to do this much more easily than we do. The separations of powers concern, I think, is real, and there is concern in selective prosecution cases about joint task forces on the street without benefit of a U.S. Attorney directing them and the case is just coming over here. I don't think that anyone can argue anything other than it is clear the young black male population is being herded into MDC to face ten, twenty, thirty-year sentences. My clients certainly are twenty-five-year-olds, all on those cracks cases, they have all been black, horrendous situations—cases that state Public Defenders prosecute every day, but for some reason are brought over here. Again, specific to Mr. Martin, I would ask not only for the information the Court has asked, but for specific reasoning for these Defendants—why were they brought over here.

Your Honor, one of the cases that I think we cited to in *Gordon*, analogizes somewhat the situation to *Batson*, where the result that you see in court can give you some indication of intent, or at least a big problem that is existing. We certainly have that here. The delay, I think, is well spent. The danger of revealing law enforcement strategies, I think, was kind of a specious argument; they haven't revealed anything other than we bring drug and gun cases over. Chilling on the law enforcement efforts—

THE COURT: I think what they were addressing was, that if they must respond and provide the information that the Court has asked, that is the criteria, then they would be disclosing maybe information that they feel that they should not have to disclose. They haven't done it yet, but I guess that's why we're discussing it.

MS. O'CONNOR: The most recent declarations from Mr. Wall that says, "Well, we targeted Inglewood because it's the second most violent neighborhood, L.A. being the first" well, what's the population of L.A.? We would see more hispanics, I think, then in these kind of cases. What we're asking is, let us look at the information that you have, your analysis—what's guiding you, and then let us present it to the Court to decide. The Government can't decide on it's own that it's acting in good faith. It might not be aware—it says to us, we have blinders on as to race. Every declaration they've given says "No one in your office thinks about race". Well, that's why the Court is here perhaps. Thank you.

THE COURT: All right, I think the expert is going to give us the answers to all these questions. The first one that I would ask is, is there something that suggests that only blacks are involved with cocaine, and is that why we're seeing such a large number? I mean, the declarations almost suggest that it's just blacks who are involved in this, so whenever a crack cocaine case is brought, the defendants are going to be black because they are the ones who are involved in crack cocaine.

MS. KRINSKY: Your Honor, I'm at somewhat of a disadvantage in that I haven't read the *Los Angeles Times* article. I think it's perhaps the only day where my daughter got to the papers before I could, so she made quite a mess of it. I believe it is correct, your Honor, as the agents have indicated to the Court, that there are socioeconomic explanations that indicate why the statistics are skewed. We don't dispute the fact that the statistics do seem to

indicate a predominance of black involvement in the trafficking of crack cocaine. We don't believe that those statistics are to the exclusion of non-black involvement. In fact, Mr. Cho, in an informal survey in our office, identified as he indicated, not two cases as Defense Counsel suggested, but eleven instances where non-black defendants were prosecuted for crack cases. So, it's not exclusively black defendants; however, your Honor is absolutely correct as the agents have indicated that there are socioeconomic reasons why certain types of drugs are prevalent among certain ethnic groups. In fact, the Asian groups generally have involvement in other types of drugs, in heroin narcotics trafficking, there's been observation that white motorcycle groups tend to be involved with distribution of methamphetamine, so there are certain socioeconomic patterns. However your Honor, the Government believes that the case law tells us that numbers and statistics alone aren't sufficient—not at the level of a selective prosecution claim in analyzing the merits of that claim, but numbers alone aren't sufficient, even when we're looking at a discovery claim, because the cases tell us that there has to be evidence of discriminatory motive, or discriminatory intent, and I believe, your Honor, the reason for that is so that we can neutralize the socioeconomic factors.

We submit that we've come back and answered for, your Honor, the motive question. The question that you alluded to a few moment ago, and we agree that's a serious question and it's a significant question, and it's certainly a question that one saw running through the prior proceeding where your Honor ordered discovery to be provided. In fact, every Defense Counsel alluded to the "why" question. Every single Defense Counsel at that proceeding asked the Government indirectly through your court, "Why is my client being prosecuted?" In fact, your Honor, at that proceeding, in discussing the *Bourgeois* case, you yourself said:

"My reading of *Bourgois*, would indicate that in that case, the Government did offer some explanation for why. In this case, the Government offers no explanation."

That was on page 8 of the transcript. Obviously I wasn't present at the hearing, but at least I've had the benefit of the transcript. Again, your Honor said on page 11:

"I think the number the Defense Counsel had submitted is adequate; that would at least require the Government to provide some explanation".

Well, your Honor, since the time of that hearing, we've tried to comply to your directive to us as to what was first and foremost in your mind to heart. We've tried to now shift the landscape from a silent record, which is what you were faced with before, from a record with no explanation as to why we proceeded on these particular Defendants, and as to why we prosecute these cases in general, to a landscape where we have addressed the "why" issue. We've submitted countless declarations that explains why these Defendants were prosecuted, and that explain in general why we proceed on narcotics prosecutions and the type of criteria that we use. Not a single Defense Counsel has come forward with evidence to the contrary. None of these attorneys have indicated to you their belief that we're lying when we've told you that there are race neutral reasons in our prosecutorial decisions, and none of them have come forward with any evidence indicating that there's a suggestion somewhere, somehow that we do consider race in our prosecutorial decisions. So, we'd submit that because of the fact that the cases require both elements, not just numbers alone, but motive as well, we're required to come forward with nothing further in response to their request.

Let me also, your Honor, suggest in response in the question that you posed to Mr. Cho—we don't view these claims lightly at all. Certainly I'm not here in any belief that I could intimidate your Honor, or anybody else, I've never been deemed to be particularly intimidating at five foot four; however, I am here to suggest to the Court that our office views any charge of discriminatory practice by prosecutors or by agents, with whom we deal, extremely seriously. Were there even the slightest indication that a AUSA in our office, or an agent or officer with whom we were dealing, had charged a case, or prosecuted a case, or arrested an individual for racial reasons, not only would we be interested, we would probably be looking at prosecuting that individual. So, we do view these charges and these types of claims seriously.

However, we've tried in the intervening six or seven seeks to address the concern of the Court. The information that we haven't provided to Defense Counsel, we haven't provided because it would require an individual review of each and every one of these one thousand plus files, and I've identified, I believe, three things that I've heard mentioned today that we haven't provided. We haven't provided the race of each of these individual prosecuted in the cases named; we don't maintain those statistics. If we did, I think that there would be cause for concern if we somehow kept track of the racial statistics of the individual whom our office prosecutes. The only way we can gather those numbers is to individually pull each file and hope that there's something in the file that would give us that information. Similarly, the involvement of the agencies in the investigation, could be learned again, only through pulling the individual files. I wish that there were some easier way to do it, but there simply isn't.

And finally, even narrowing this group to crack cases, would require an individual review of each file. That's not information, again, as far as Mr. Cho and I are aware, that

our computer can pull out or that can be learned through any type of computerized run. So, we've tried to provide the more general information that our computer run makes accessible to us. We've also tried to answer the most significant question that existed at the time of the prior proceeding, namely the motive question. It would be a big expense for any party to have to go through an individual review of the file. Even if the Government did it in the form of the U.S. Attorney's office, while that may be a different pocket of the Federal Government, it's none-the-less a big expense that would be incurred by the Federal Government. And, we submit that we're not required to do it, not because it's too onerous, and not because it would be costly—we're not required to do it because it's the Defendant's burden to come forward with a showing before discovery needs to be provided, and as we indicated, we submit that they've failed to do that.

If I may, your Honor, I'd like to briefly touch on the few and really the very few cases that have dealt with these types of issues, and show how in contrast, the showing that's been made here, it is really nothing short of woefully inadequate. Defense Counsel is correct, the *Bourgeois* case is the leading case and the most recent case in the Ninth Circuit on selective prosecution; however, I believe Ms. O'Connor misspoke in suggesting that *Bourgeois* doesn't deal with the discovery issue. *Bourgeois* deals squarely with the question of how much of a showing must Defense Counsel make, not before claim is to be sustained, but before discovery need even be provided, and in answering that question, the Ninth Circuit in *Bourgeois* made clear that it's a heavy burden and a high threshold that must be overcome before discovery need even be produced by the Government. And we submit, your Honor, that they set that high threshold for good reasons, because the Court recognized that we shouldn't tread lightly in this area based on mere speculation, based

on general observations or broad pronouncements by Defense Counsel. In setting the high threshold in *Bourgeois*, the Court similarly recognized that there are two separate and independent parts to the equation—not just discriminatory effect, and that's the numbers part of the equation that needs to be shown, but the Court recognized separate and apart from discriminatory effect is the requirement of the showing of discriminatory intent, and that's where we believe, your Honor, above and beyond anything else, the showing that we have here is inadequate, because now, in the face of numbers alone, we have not a silent record as we did when we were previously before your, now we have a record replete with explanations—declarations as to the Government's motive in prosecuting, declarations which, as I indicated, have not been refuted, statements which have not been claimed to lack credibility. In response to those declarations, all we have from the Defense camp is general pronouncements based on numbers, pronouncements, which again, have no indication of anybody in our office who has a race based motive in prosecuting cases.

The only three cases addressing some type—sanctioning some type of discriminatory—some type of selective prosecution claim, make clear that that second part of the equation, the "why" part, the motive part, is equally important. If fact, in the *Steele* case, the last Ninth Circuit case over two decades ago to sanction a selective prosecution claim, the Court noted that the Government had admitted that they prosecute only hardcore census protesters, so the Government was admitting that they selected out the protesters to prosecute, and in that case, the Government refused to provide any explanation for why they selected those people for prosecution. So, there we had the Government's admission, coupled with no explanation to the contrary. Similarly, in the *Gordon* case, which Ms. O'Connor alluded to, a voting fraud prosecution, we had equally clear evidence of discriminatory motive

and intent. In that case, Defense submitted declaration—a statement from a representative of the Department of Justice, in which that representative explained the investigations as follows: the representative in the case said that the investigations were quote, “part of a new policy brought on by the arrogance of black leaders”—obviously, an unfortunate view at that time of why we prosecute cases, but again, your Honor, in that case, there was clear evidence of discriminatory intent by the Government. Again, it was not numbers alone.

And finally, in the *Adams* case, the Sixth Circuit case the Defense Counsel has also relied on, that was a case involving a false tax—a tax return prosecution. Defense Counsel submitted an affidavit again of a Government employee, saying that that employee believed that the prosecution was motivated by retaliation against the defendant, an individual who had sued the EEOC. So again, we had evidence in that case of discriminatory motive on the part of the Government. In contrast, there’s simply no evidence of race-based decision making here. In fact, what we have here is similar to the *Wilson* case, from the Ninth Circuit, a 1981 decision. In *Wilson*, the Ninth Circuit rejected a selective prosecution claim, in spite of the fact that the defendants had shown and the Court found that there was some evidence suggesting that all tax protestors are prosecuted, and that the IRS hadn’t, in recent years, prosecuted any non-protestors. So, we have compelling evidence of numbers in that case, even more compelling, I’d submit, than we have here. The Court, however, held that the defendants quote:

“do not prevail, however, because they’ve not introduced evidence which convincingly shows that they were prosecuted because of their exercise of constitutional rights”.

The Court said all prosecutions are to some degree selective. Unless one can show that the tax laws are

deployed against protestors in retaliation for the exercise of their rights, a selective prosecution argument will fail. So again, the Ninth Circuit has told us that numbers alone are not going to be sufficient for either a claim on the merits or for discovery.

Beyond that, your Honor, we submit that on the discriminatory effect part of the equation, that their claims similarly have to fail because they haven’t identified similarly situated individuals who haven’t been prosecuted, and that’s part and parcel of discriminatory effect. While they’ve tried to show instances where white narcotics users were white, small time dealers, were prosecuted in the state system, we submit that they failed to show individuals who, at the same level of offense—the same level offenders with priors and with quantities of this nature that the Federal Government had failed to prosecute, and that by definition means, that they failed to show similarly situated individuals that we haven’t prosecuted.

We also submit that the numbers that they have provided show not some type of general prosecution of black individuals. They’ve identified twenty-four cases. Last time we had twenty-four in contrast to zero, now we have twenty-four in contrast to eleven, and even if it were twenty-four in contrast to zero, twenty-four can’t be statistically significant. And, as we indicated to the Court, there are race-neutral explanations for even those twenty-four cases. The socioeconomic factors that I eluded to at the outset. To the extent, your Honor, their information is vague; they have the opportunity and they have the burden to gather more information. If they’re looking for information from the state system as one of the Defense Counsel referred to in passing, they have as much opportunity as the Government possibly could be subpoena information from the state system. We’ve tried to meet the Court halfway; we’ve tried to address what we believe to be the most troubling of the concerns identified at the prior hearing, namely the “why” question.

And, we submit, given the landscape and given the record that we now have before your Honor, that there's simply no showing commensurate with what the Ninth Circuit and with what the case law requires. Accordingly, we would ask that your Honor join with Judge Letts and Judge Real, who on identical factual showings similarly denied requests for discovery, and we'd ask that your Honor join as well with District Court Judges out of other districts. It's my understanding that this exact type of claim, not surprisingly, has been raised in other districts, not surprisingly because of the socioeconomic factors based on the areas where crack cocaine is prevalent, and I'm not aware, having checked with the other Ninth Circuit Appellate Chiefs in all of the offices from the Ninth Circuit, I'm not aware of a single instance where discovery has been ordered beyond what the Government has provided in this case. So we'd ask, your Honor, based on the case law, to find that there is simply no requirement that the Government provide anything further.

I don't know if I've addressed all of the questions that you posed over the course of the proceeding today, if there are any other questions, I would gladly address them.

THE COURT: I have no additional questions. I would ask the Defendants though, would you identify and then—I believe that I have reviewed everything that the Government has provided. Would you identify for me the additional declarations that you've provided—any additional filings that have been provided to the Court. I just want to make sure that I have reviewed everything that the Defendants have provided. If you could give me the date of the filing and the description of what it is. As Counsel indicated, we started out with this motion same weeks ago, I guess months ago now, and since that time, there have been additional filings, there have been additional hearing dates, but for various reasons, the case has had to be continued, so I just want to make sure I've reviewed everything that's been filed.

MR. REED: Your Honor, the only thing—David Reed on behalf of Christopher Armstrong—is the November 9, 1992 joinder in the selective enforcement discovery motion and a supplemental declaration by myself, and I lodged that news article today; that's all I've filed.

THE COURT: All right. Mr. Lannen, have you filed anything other than a joinder that just indicates that you are joining?

MR. LANNEN: Your Honor, I don't have a copy of mine, but I did file a joinder with a supplemental declaration. Is that what the Court has?

THE COURT: I don't have it before me at the moment, but—

MR. LANNEN: It is in the court file, because I actually checked it. I lent my copy of—my stamped copy—but there's a joinder with a supplemental declaration which concerns the facts are related to Mr. Hampton.

THE COURT: Do you recall when it was filed?

MR. LANNEN: I don't, your Honor, but I can get it in a minute.

THE COURT: All right. Ms. O'Connor, you field the original motion in the case, and—

MS. O'CONNOR: Yes, your Honor. I filed an opposition to the motion for reconsideration on October 5th, and included a declaration from Marla Beller, the paralegal who had done the initial list of cases, and I just want to address Mr. Krinsky's argument on that. You can't compare our twenty-four to the eleven that are now pending, because as was clearly indicated, are list—we tried to break this down into a discrete group that could be analyzed statistically correct. Those were cases that were closed by our office during 1991. The four hispanic clients that they identified were either open cases or closed in some other year. It was clear that that's what our initial list provided. Now, were we to update to this date, I think we would come up with similar results consistent with the *Los*

Angeles Times information from the sentencing commission—ninety-two percent black defendants in crack cases this years.

THE COURT: I haven't read the *Times* article yet, but does Counsel believe that it addresses the question that the Court stated and the Government's Counsel responded to it? Is it that there is information that suggests that the only person involved in crack cocaine are African Americans or blacks, or is the percentage of African Americans and blacks so high that the rest would just be minimum? Did the article address that or—

MS. O'CONNOR: The article does address it somewhat, and I think presents conflicting experts which one would assume both sides could come up with experts analyzing the drug problem.

THE COURT: That was going to be the next inquiry. I just assumed that none of the Defense Counsel have attempted to obtain, or have obtained, any expert testimony that would suggest whether the nature of the—the concern that the Court expressed—if that is true.

MS. O'CONNOR: That's correct, your Honor. And, I also wanted to comment that the fact that we haven't been able to identify a Government agent willing to say, "Yes, I was acting on the basis of race" doesn't mean it doesn't exist, and—

THE COURT: I'm not sure that we'd find anybody that would say that.

MS. O'CONNOR: I doubt that we would. Now, luckily in those other cases, they were able to come up with those individuals who clearly had improper motives. There is case law stating though that the result—like *Batson*—the result can be circumstantial evidence of intent somewhere along the line, and at this point we think that we have shown a colorable basis for discovery.

THE COURT: Any of the other Defense Counsel—I'm just inquiring about things that have been filed that maybe

the Court hasn't reviewed—so if anybody else has filed anything in the form of a declaration or a opposition, or anything of that type, please identify.

MR. WALSH: On behalf of Robert Rozelle, on August 13, there was just a one-page joinder motion filed.

THE COURT: And it was just a joinder, no declaration attached?

MR. WALSH: That's correct.

THE COURT: Okay.

MR. BORTMAN: Your Honor, as you know, Mr. Mack was arraigned very recently; a matter of days ago. I am aware of the great confidence of my Co-counsel, and as I indicated before, I would join in their motions and won't be adding anything else.

THE COURT: Now, as far as the Government's filings are concerned, there were of course the initial opposition to the discovery request. The Government's motion for reconsideration, and the Government's supplemental declaration. Is that it?

MR. CHO: That was all, your Honor.

THE COURT: Okay. All right, I'm going to deem the matter submitted at this point just for purposes of reviewing some of the cases that have been addressed today and looking at the declarations and so forth if I've not reviewed them, and if I have, just to refresh my recollection, and then I will issue an order. Mr. Levario indicated to me that there's an interest in changing the trial date in this case, and advancing it—something that doesn't happen very often. I didn't expect that everyone would be in agreement to advancing, but he tells me you are. Is it January 5?

MR. LANNEN: Yes, your Honor.

THE COURT: As long as that date is acceptable to all of the Defense Counsel and the Government, then he tells me that it's available on our calendar, so I would change the date to that date. Do all Defense Counsel agree to January 5?

(Affirmative response.)

THE COURT: And, how about the Government?

MR. CHO: No objections, your Honor.

THE COURT: Okay. The trial date at this point—we'll change the trial date so that it will be January 5.

MR. LANNEN: I take it, your Honor, that that is subject—if the Court were to not—were to deny the reconsideration, I would imagine that the Government would need time. I'm just—

THE COURT: Well, I'll wait to see what happens. If I deny the motion, then the Government will advise the Court as to whether it's inclined to provide more information, or whether it feels at this point that it shouldn't have to do so, and then what would be the next step for the Government to take. If I grant the motion, then—if I grant the motion—I said it backwards—if I grant the motion, then I think the Government will advise the Court as to what their position might be. If I deny the motion, and I'm not talking about the discovery motion, we'd be on track. So, I think that that's something I can't address; I'll just wait and see.

MR. REED: Your Honor, just in case this comes up down the road, and the Ninth Circuit hears this case, I want the Ninth Circuit to know that we were willing to compromise with the Government to come down on the years—to come down on the nature of the items that were requested.

THE COURT: It would be nice if the issue was that simple, but I doubt if that would really make a difference. All right then, I'll deem the matter submitted. We do have the trial date now, the 5th, depending upon how the Court rules on this, that might change, but I'm sure that the appropriate side would bring it to the Court's attention if there is a need now to further discuss the trial dates.

(Proceedings concluded.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

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FAX page 01

Harsher Crack Sentences Criticized as Racial Inequity

■ Narcotics: Mandatory penalties are unfair to blacks, critics say. Terms are stiffer for smokable cocaine.

By JIM NEWTON
Times Staff Writer

Since late 1991, Curtis Harding has been locked in federal prison, where he and the other crack criminals jammed into the cells around him have two things in common: They are being punished far more severely than if they had been caught with powder cocaine, and almost every single one of them is black.

"There's no whites here doing time for crack. It's all blacks," Harding said in a recent telephone interview from the Federal Correctional Institution in San Francisco, Calif. "It's supposed to be equal, but how is that equal?"

There are many whites who are serving federal time for cocaine offenses. The difference is that cocaine criminals who are white almost always have violated powder cocaine laws. These crimes carry much shorter sentences even though powder cocaine is easily converted into crack.

It is hardly a surprise that Harding complains about federal drug laws. But his criticisms are shared by a growing chorus of legal scholars and defense lawyers, and are reflected in major calls for congressional action and in a spate of appeals filed by federal public defenders across the country. Many critics charge that federal crack laws are subjecting thousands of African-Americans to unfairly long prison sentences, while treating whites with comparative leniency.

Preliminary studies suggest that more than 90% of all federal crack defendants are black, and many are serving mandatory prison sentences of five years or more for as little as five grams—an amount that barely raises an eyebrow in powder cocaine cases and warrants no mandatory prison sentence.

At the same time, most drug experts, prosecutors and defense attorneys believe that crack, while chemically indistinguishable from powder cocaine, is far more addictive and socially destructive because of the way it is marketed and ingested. They acknowledge that crack laws have punished blacks disproportionately, but they say differentiating between crack and powder is needed in order to thwart an epidemic drug crisis.

"This form of cocaine is extremely dangerous," said Dr. Robert Byck, a Yale University professor and nationally recognized cocaine expert. "The smokable cocaine habit is much more dangerous than the inhaled cocaine habit."

Dr. Ronald K. Siegel, a psychopharmacologist at UCLA and one of the first medical experts to document the crack cocaine phenomenon, agrees that smoking crack is dangerous. But he calls the federal sentencing laws, which equate each gram of crack with 100 grams of powder, "arbitrary and capricious, and medically and scientifically wrong."

Siegel said smokable cocaine first appeared in the United States in 1885 with the introduction of corn leaf cigars and cigarettes. Freebase, a powerful form of smokable cocaine, emerged almost a century later, and the first record of emergency room admission was in 1974 at UCLA. In those days, freebase was mostly abused by whites.

Freebase is highly addictive, euphoric and dangerous to health because it is, which is flammable, is used to produce it. Still, freebase initially attracted little mainstream attention, and Congress took no action to punish freebase smokers more severely than cocaine smokers.

It was not until 1985 that crack—

manufactured by a simple technique that eliminated the need for other—found its way into the inner city. Congress then stepped in, holding hearings that were marked by their pitched rhetoric.

"The drug epidemic is as dangerous, if not even more so, than any other terrorist that this nation faces," Sen. Alfonse M. D'Amato (R-N.Y.) said during those hearings. "Terror is being spread in our neighborhoods, in the homes and throughout this great nation of ours."

Under the sentencing laws that Congress enacted, every gram of crack was considered the equivalent of 100 grams of powder cocaine.

As a result, a defendant convicted of intending to sell five grams of crack must be sentenced to at least five years in prison, regardless of extenuating circumstances. To trigger the same minimum for a powder defendant, the criminal would have to be convicted of trying to sell 500 grams.

Why did Congress consider crack 100 times more severe than powder? Why not 10 times or 50 times—or 500 times, for that matter?

"The number is arbitrary," said Byck, who testified during the 1986 Senate crack hearings. "It neither makes sense nor doesn't make sense. It's just a number."

Try telling that to Harding. For him, it is the difference between two years in prison and 10.

Harding, who pleaded guilty, was convicted of possessing 89.1 grams of crack with the intent to sell it. Even though the judge tried to impose a lighter sentence, he ended up giving Harding 10 years, the mandatory minimum for possession of 50 grams or more. Had Harding pleaded guilty to possessing the same amount of powder cocaine, there would have been no mandatory minimum, and Harding probably would have spent less than two years in prison.

Meanwhile, powder cocaine offenders receive comparatively easy

CRACKING

Vincent D. Bonito possessed 2,482 grams of powdered cocaine when he was arrested at Los Angeles International Airport on Nov. 14, 1990. Bonito's cocaine easily could have been converted into 2,500 grams of crack. All it would have taken is some baking soda and water.

Bonito, who is white, was sentenced to seven years in prison—less time than Harding got even though Bonito possessed 25 times as much cocaine.

The largest-scale cocaine traffickers—Colombian cartel leaders, for instance—usually smuggle powder cocaine, not crack. Crack dealers are more likely to be street-level drug pushers than big-time cartel bosses. And they are much more likely to be black.

Studies on the subject are inconclusive, but what is obvious is that a defendant in a federal courtroom is generally borne out by these statistics that are available.

For example:

• The Federal Public Defender Service in Los Angeles concluded 23 crack cases in 1991. All 23 defendants were black.

• In the Northern District of Georgia, 10 defendants were charged with crack-related crimes from early 1990 through Sept. 30, 1991. Sixty-nine were black or Latino.

Nationally, figures showing the racial breakdown of federal drug offenders show that from April 1 to July 31, 1991, crack offenders were sentenced in federal courts across the United States. More than 92% were black.

The same study, conducted by the U.S. Sentencing Commission, found that 45% of defendants sentenced for powder cocaine were white—compared to 4.7% sentenced in crack cases.

Even supporters of the sentencing law acknowledge that such numbers are disturbing, but many experts stress that smoking crack is a particularly destructive poison with serious social consequences—many of which are deeply felt in black, inner-city areas.

It is unfortunate that principally blacks are out in the streets selling this stuff, and they're getting caught," said Rep. E. Clay Shaw, a Florida Republican who has long backed tough drug laws. But the population of the

community that is principally victimized is also black. We're trying to get to that and save these communities."

Supporters of the stronger sentences also point out there is a broad medical consensus that smoking crack is more addictive than smoking cocaine. Because it is smoked, crack goes to the brain more quickly than powder. That causes a stronger, shorter high, but it also causes a sharper fall when the drug wears off, leaving the user with an intense craving for more.

Although both crack and powder are cocaine, some experts note that there is legal precedent for regulating drugs differently when they have the same active ingredients. As Byck notes, beer and wine often are regulated differently than Scotch or vodka, even though all these beverages impair users because they contain alcohol.

Critics of the crack sentencing laws reject that comparison.

"When a Highway Patrol officer pulls you over, he doesn't care whether you've been drinking Jack Daniels or beer," said Suzanne Hoshimi, a federal public defender in Atlanta who has challenged the crack sentencing law in federal court. "He only cares whether you're drunk."

A better analogy to the crack-powder issue, experts say, is the sentencing approach to methamphetamine traffickers. Methamphetamine, a powerful stimulant, usually is consumed as a powder, but it can be converted into a smokable version known as ice.

Smoking ice has a more powerful effect on the user and is considered more addictive and more dangerous than snorting methamphetamine for the same reason: that smoking crack produces stronger results than snorting cocaine.

But for sentencing purposes, one gram of ice is treated as 10 grams of methamphetamine, while crack cocaine is considered the equivalent of 100 grams of powder. Also, even though the effects of smoking ice are stronger than those associated with smoking crack, ice is considered half as serious as crack for sentencing purposes.

Finally, ice dealers and methamphetamine dealers are almost exclusively white, so a disparity in the sentencing does not result in defendants of one race doing more prison time than those of

another.

These are important distinctions," said David S. McLane, the deputy federal public defender in Los Angeles who represents Harding. "Maybe I'm cynical, but I think that if you saw a lot of young white males getting five- and 10-year minimums for dealing powder cocaine, you'd have a lot more reaction."

McLane and his colleagues in federal public defender offices across the country have argued that the appellate courts should overturn the congressionally approved sentencing distinction. The federal courts have repeatedly rejected that argument, turning back challenges from California, Nevada and Georgia, among other places.

The only high-level victory for critics of crack sentencing laws has been in the Minnesota Supreme Court, which overturned a state law that punished crack offenders more severely than powder criminals.

The litany of failed federal challenges has convinced some critics of the sentencing law that they might have better success if they took their case to Congress rather than the courts. Shaw and some other congressional insiders, however, see little appetite in Washington for weakening federal crack laws.

"There's going to be political fallout for cutting back on sentencing requirements for drug dealing," Shaw said. "That's exactly an uphill fight."

Still, some observers note that a new Congress is about to convene, one that will have many new members, including many minorities.

"A law that is so racially discriminatory must be re-examined if we are to be true to our concept of equal justice," said Eric S. Stedding, president of the Washington-based Original Justice Policy Foundation. "The question is whether this new Congress will have an appetite for it."

Crack: The Racial Divide

No drug is more closely associated with race than crack cocaine. Those convicted of powdered cocaine offenses are often Anglo, but crack offenders—who face far stiffer sentences—are overwhelmingly black. Below, results of study of all drug offenders sentenced in federal court from April 1, 1990 to July 31, 1992.

POWDER COCAINE
Anglo: 769 (45.2%)

MONDAY, NOVEMBER 23, 1992, LOS ANGELES TIMES, PART A
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MONDAY, NOVEMBER 13, 1992 LOS ANGELES TIMES, PART A
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FAX page 2

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Other: 30 (1.84)

CRACK COCAINE
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Letter: 14 (2.64)
Other: 1 (0.24)

Drug offenders in federal court receive sentences based on the type and quantity of the drug and on such factors as the defendant's criminal history. For sentencing purposes, each gram of crack cocaine is the equivalent of 100 grams of the powdered form of the drug. Here is a comparison of those sentences for hypothetical crack and powder cocaine defendants.

CASE 1: A suspect is caught with 70 grams of crack and is convicted of possessing the drug with intent to sell it. The suspect has no prior criminal history.

Prison sentence: 121-151 months.

CASE 2: A suspect is charged and convicted of possession with intent to sell 70 grams of powdered cocaine. The suspect has no prior criminal history.

Prison sentence: 21-27 months.

Source: U.S. Sentencing Commission, sentencing data files; also U.S. Sentencing Commission Guidelines Manual [1992].

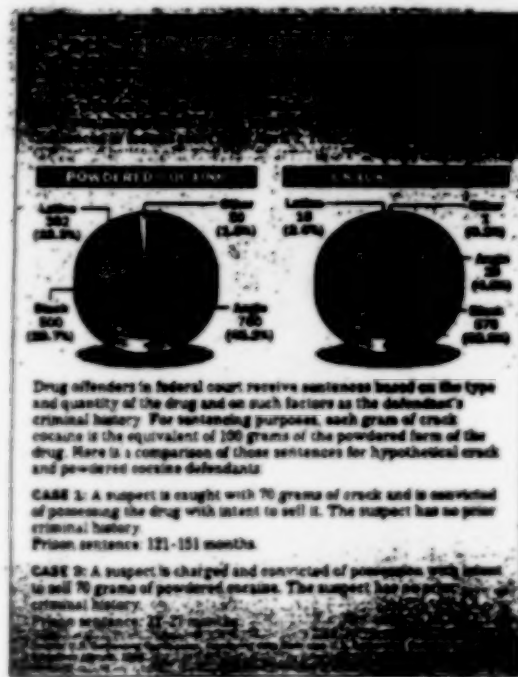
Chart:
Crack, The Racial Divide
Los Angeles Times

Type of Material Infobox

Descriptives
DRUG ABUSE
COCAINE
SENTENCING
CRIMINAL LAW
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BLACKS - UNITED STATES
CRIME STATISTICS

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UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA CRIMINAL MINUTES - GENERAL

9201848

Case No. CR92-336 CBM

Date 12/29/92

DOCKET ENTRY The Government's motion for reconsideration of Court's ruling is denied (CBM)

RECEIVED

1992

U.S. ATTORNEY
CRIMINAL DOCKETS

PRESENT NOW CONSUELO B. MARSHALL JUDGE

Joseph M. LEVATTO
Deputy Clerk

n/a
Court Reporter

n/a
Asst. U.S. Attorney

U.S.A. - DEFENDANTS LISTED BELOW:

ATTORNEYS FOR DEFENDANTS

DEFENDANT	ATTORNEY	PRESENT	CRIMINAL	RECEIVED
CHRISTOPHER ARMSTRONG, et al	n/a			

PROCEEDINGS:

DEC 29 1992

Joseph M. Levatto

YES FORM 6
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Initials of Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CRIMINAL MINUTES - GENERAL

Case No. CR92-33A CBMDate 1/5/93

DOCKET ENTRY: Motion of defts' to dismiss indictment is granted. Govt's motion to stay dismissal for 48 hours is granted. Cont'd to 1/8/93, 10AM as to defts Martin, Armstrong & Roselle for a status conf & bail motions. Ct orders that Mack shall remain on bond & upon same conditions of release (CBM)

PRESENT: HON. Joseph M. Levario JUDGE: Laurence Cho
Deputy Clerk: Esther Mays Court Reporter: Am. U. & A.

U. S. A. - (DEFENDANTS LISTED BELOW): ATTORNEYS FOR DEFENDANTS

(1) Christopher Armstrong, not pres. David Reed, pres. apptd.
— present — X — custody — bond — O/R — present — appointed — retained

(2) Roselle, pres. custody IN T. Lannen for J. Walsh
— present — custody — bond — O/R — present — appointed — retained

(3) Sharon Hampton, pres. custody O Timothy Lannen, pres. apptd.
— present — custody — bond — O/R — present — appointed — retained

(4) Roselle Mack, pres. bond IN David Bortman, pres. apptd.
— present — custody — bond — O/R — present — appointed — retained

(5) Shelton A. Martin, pres. custody Y Barbara O'Connor, pres. apptd.
— present — custody — bond — O/R — present — appointed — retained

PROCEEDINGS



MINUTES FORM 6
CRIM - GEN

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Initialed Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CRIMINAL MINUTES - GENERAL

Case No. CR92-33A CBMDate 1/19/93

DOCKET ENTRY: Motion of govt's chal to dismiss indictment as to deft Armstrong granted. Def't's motion to set bail denied. Court finds that deft is a danger to the community. Court orders that deft remain detained. Exhibits 1, 2, 3, 3A & 4 are admitted into evidence (CBM)

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U. S. ATTORNEY
CENTRAL DISTRICT OF CALIFORNIA

PRESENT: HON. Joseph M. Levario JUDGE: Laurence Cho
Deputy Clerk: Esther Mays Court Reporter: Am. U. & A.

U. S. A. - (DEFENDANTS LISTED BELOW): ATTORNEYS FOR DEFENDANTS

(1) Christopher Armstrong, pres custody (1) David Reed, pres. apptd.
— present — custody — bond — O/R — present — appointed — retained

(2) — present — custody — bond — O/R — present — appointed — retained

(3) — present — custody — bond — O/R — present — appointed — retained

(4) — present — custody — bond — O/R — present — appointed — retained

(5) — present — custody — bond — O/R — present — appointed — retained

PROCEEDINGS

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CR92-336-CBM
Los Angeles, California

UNITED STATES OF AMERICA, *Plaintiff,*

v.

CHRISTOPHER LEE ARMSTRONG, ROBERT ROZELLE,
AARON HAMPTON, FREDDIE MACK, SHELTON AUNTWAN
MARTIN, AKA "PSYCHO," *Defendants.*

Tuesday, January 5, 1993
9:55 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CONSUELO B.
MARSHALL
UNITED STATES DISTRICT JUDGE

APPEARANCES:	LAWRENCE CHO, ESQ.
For the Plaintiff:	Assistant United States
LOURDES G. BAIRD, ESQ.	Attorney
United States Attorney	312 N. Spring Street
ROBERT L. BROSIO, ESQ.	Los Angeles, California
Assistant United States	90012
Attorney	
Chief, Criminal Division	

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

For Defendant Armstrong:
DAVID REED, ESQ.

For Defendant Rozelle
and Defendant Hampton:
TIMOTHY LANNEN, ESQ.

For Defendant Mack:
DAVID BORTMAN, ESQ.

For Defendant Martin:
BARBARA O'CONNOR,
ESQ.

Deputy Federal Public
Defender
312 N. Spring Street
Los Angeles, California
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(619) 453-3325

LOS ANGELES, CALIFORNIA
TUESDAY, JANUARY 5, 1993 9:55 A.M.

(Call to order of the Court.)

MR. CHO: Good morning, your Honor. Lawrence Cho on behalf of the United States.

MR. REED: Good morning, your Honor. David Reed on behalf of Christopher Armstrong. I understand that he's sick in the hospital with the chicken pox. He's not present in court.

MS. O'CONNOR: Good morning, your Honor. Barbara O'Connor appearing on behalf of Shelton Auntwan Martin who is present in court.

MR. BORTMAN: Good morning, your Honor. Dave Bortman on behalf of Freddie Mack.

MR. LANNEN: Good morning, your Honor. Timothy Lannen appearing on behalf of Aaron Hampton who's

present, and also standing in for Joseph Walsh who's in trial for Robert Rozelle.

THE COURT: And is he present as well?

MR. LANNEN: Who is also present, your Honor.

THE COURT: And is Mr. Mack present as well?

MR. BORTMAN: He is, your Honor.

THE COURT: Now, as to Mr. Armstrong, Mr. Reed, since Mr. Armstrong is not present today because he cannot be here because of illness, what is your position as to whether the Court should proceed without him?

MR. REED: We'd like the Court to proceed without him. We'd waive his appearance, your Honor.

THE COURT: He does not have a waiver on file, however.

MR. REED: No, he doesn't.

THE COURT: What the Court intends to do today—today is the day that we're to commence trial in the case.

The Court recently heard a motion for reconsideration, and I have, through the clerk, indicated to the parties that the motion is denied, and I will make some statements for the record concerning the motion, and at that point, then, I will hear from the parties as to whether you are now ready to proceed to trial. Even if you were, you probably couldn't go forward because one Defendant is ill and can't be here, so it probably would result in a continuance, but that will be discussed with the Court, and the Court will then issue a ruling.

So that's what I intend to do today. It is a proceeding. Defendants have a right to be present. Mr. Armstrong does not have a waiver on file. His appearance probably requires a personal waiver rather than having one by counsel, but I think we're in a situation where some decisions have to be made with the case.

Even if the Court were to not issue its rulings on the motion for reconsideration, the case would still have to be continued, and I assume it would be Mr. Armstrong's

client that would make that request, so having said that I think that we'll proceed in the manner in which the Court has indicated.

As far as the motion for reconsideration is concerned, the Court did communicate through the clerk that the motion is denied.

The previous findings made by the Court remain in full force and effect, and I won't go over those again, but will specifically find that the Defendants have made a sufficient showing to require the Government to produce the evidence that the Court ordered be produced.

The statistical data provided by the Defendant raises a question about the motivation of the Government which could be satisfied by the Government disclosing its criteria, if there is any criteria, for bringing this case and others like it in Federal court.

Without the criteria, the statistical data is evidence and does suggest that the decision to prosecute in Federal court could be motivated by race.

Without expert testimony, this Court cannot conclude that the Defendants' evidence is explained by social phenomena.

The executive branch has a responsibility to dissuade public opinion that its decisions to prosecute or where to prosecute are not motivated by improper reasons such as race, and the evidence of who was prosecuted and why those persons were prosecuted and where those persons were prosecuted is within the peculiar knowledge of the Government and therefore, as the Court indicated at the previous hearing, it would be this Court's position that it is the Government that would have to provide that evidence so that Defendants could analyze it and decide if there is any basis for filing a motion to dismiss.

Therefore, the Court's previous ruling remains in full force and effect. The Court still requires that the Government produce that information that the Court had previously ordered.

If there are any questions or additional findings that either side would request the Court to make for purposes of review, the you may make that request.

I should say, if I didn't, on the record that I have now reviewed all of the evidence offered by all parties in the case.

At the last hearing, if you'll recall, there were—there was some evidence. One piece of evidence was the newspaper article that had been offered both by—by two of the Defendants, and the Court had not reviewed that article at the time of the hearing; however, I didn't find anything in the article to really be persuasive, but I did read it since it was offered to the Court.

I have now read all of the evidence offered by all parties in the case.

Does the Government require—request that the Court say anything specific other than what I've said on the record?

MR. CHO: No, your Honor.

THE COURT: Okay. How about the Defense?

MR. REED: Your Honor, could we just have a second?

THE COURT: Yes.

(Pause to confer.)

MR. BORTMAN: Submitted, your Honor.

THE COURT: All right. The Court having made its findings, now I'll hear from counsel relative to whether the case should proceed to trial as set today, at least as to those Defendants who are here and available to go, or whether there is a request for continuance.

MR. CHO: Your Honor, if I may. The first question I have, though, is concerning Mr. Armstrong's appearance.

I am somewhat concerned that, as the Court indicated, a personal waiver may be necessary for this hearing. I'm particularly concerned because I'm going to ask on behalf of the Government that the Court dismiss the case so that we can have an appealable issue and stay execution of the

dismissal for 48 hours so we can formally file our notice of appeal up in the Ninth Circuit.

But again I have some reticence about that because obviously that would be a decision and an order that would greatly affect what happens with this case in the future, and without Mr. Armstrong being present, I have some concerns that that may raise additional problems down the line, either on appeal or perhaps on collateral attack.

I'm not quite sure what I could suggest to the Court. Perhaps if a personal waiver could be subsequently filed, that'll probably solve everything. If not, then perhaps a formal ruling by the Court as to what should happen with this case may be delayed until Mr. Armstrong can make a personal appearance or until a waiver could be filed.

Aside from that, your Honor, again the Government would request that the Court dismiss the indictment so that we can appeal this to the Ninth Circuit and do so on an expedited basis.

THE COURT: All right, Defense Counsel—Mr. Reed, you may be heard first. The Court already expressed its concern that, even if the Court didn't have before it this motion for reconsideration, today is the day set for trial. One Defendant is ill and can't be here. I assume what would happen is that Defendant's counsel would appear and would make a motion for a continuance, even though that Defendant is not present.

What would probably happen, though, is the continuance would only be for a period of time until the Defendant could be with us again, is well and able to be here, so in this case that might be a week or maybe something even less.

The other possibility is actually having Mr. Armstrong execute a waiver of appearance, if he's inclined to do so.

Then the Court would have to give counsel an opportunity to get such a waiver executed or not be able to do so and then return to court and report on that.

I'll hear from you first. I don't know what your motion would be this morning, whether you would be just making a motion to continue the trial until your client is well enough to proceed and whether the other Defendants then would ask to go forward or also ask for a continuance or would concur in the Government's request that the indictment be dismissed. I'm not sure what your position is.

MR. REED: Your Honor, yes, I would have—I would be asking for a continuance had Mr. Armstrong been here, and I think perhaps the wisest way to proceed is, instead of relying on Mr. Armstrong executing a personal appearance waiver in the future nunc pro tunc for toady, which I'm not sure he would execute, I think the wisest thing to do at this juncture is perhaps to put the case over for a few days.

We were intending to put the case on for bail motions' cause the Government has indicated to us before coming into court that they intended to appeal this.

We wanted the Court to hear bail motions so that the Defendants wouldn't be in custody during the pendency of the appeal.

Perhaps it would be wise to put the case over to perhaps this Friday. By that time, Mr. Armstrong certainly—or not certainly but probably would be able to be with us on Friday. We can go through the procedure that the Government wishes to go through in terms of the dismissal with the Defendant being present, or the request for the dismissal, and at the same time hear bail motions.

I just offer that as a suggestion.

THE COURT: If Mr. Armstrong were here today, would you be requesting a continuance, or would you be asking to go forward, proceed to trial, or would you be asking that the Court dismiss the case?

I assume that the basis for the Government's dismissal is that the Government at this point will not comply with the Court's order; therefore, the information that the Court

ordered wouldn't be available to the Defense; therefore, the Defense wouldn't be able to pursue the motions that you wish to pursue if the evidence had been given to you, so—

MR. REED: Yes, your Honor.

THE COURT: What would Defendant Armstrong's position be? Would you be asking that the trial be continued or that the case be dismissed?

MR. REED: I'd ask that the case be dismissed. The Government has not complied with the Court's order, and we would certainly, on behalf of Mr. Armstrong, ask that the case be dismissed at this point.

If the Court was not inclined to dismiss the case, then certainly we'd be asking for a continuance of the trial so that eventually, if the appellate court felt it appropriate, obtain the discovery that we need to make the discriminatory enforcement motion down the road.

So in any case we wouldn't be asking to go to trial today.

THE COURT: And you would then not be objecting to the Government's request that the case be dismissed.

MR. REED: Well, I'm not sure about that because frankly at this point I've had a lot of cases that have gone up on interlocutory appeal and I don't recall the Government coming in and dismissing the case in order for it procedurally to go up on interlocutory appeal, so I'm not sure, to be frank with the Court, what the Government is doing in terms of requesting a dismissal so that they can go up on appeal at this point, and I'd like to have a chance to do some research in that area.

THE COURT: Could I hear from other counsel, please?

MS. O'CONNOR: Good morning, your Honor. We were ready for trial today, but obviously would move for dismissal of the case based on the Government's failure to comply as well.

I think the Court is aware that I had filed two late motions last week; namely, a motion to suppress based on

an arrest report that I received late and also a motion for severance based on primarily the Government's refusal to allow us to have a bench trial and to allow Mr. Martin to waive jury in this case.

I had also spoken to Mr. Levario yesterday about putting on a bail hearing for Mr. Martin as quickly as possible. Certainly Friday would be agreeable. His uncle is willing to act as a surety, I believe, and could be present on Friday—was unable to be here today.

Again, I think we're all a little confused by the Government's posture, but certainly happy to have the case dismissed should it go that way.

THE COURT: Well, it's kind of interesting. The Government would ask the Court to dismiss the case, and normally you'd expect that Defendants wouldn't oppose that, but yet the Defendants in this case aren't quite sure what their position might be in that regard, so I'm not sure what you're saying. At this point, are you opposing the Government's request to dismiss and, like Mr. Reed, asking for additional time so that you can do some research on your own as to what effect that might have on the case, or are you not opposing the motion so that, if the Court were inclined to grant that motion, then your client would be—the case would be dismissed against him?

MS. O'CONNOR: I would agree with that, your Honor.

THE COURT: So you are not opposing—

MS. O'CONNOR: No.

THE COURT: —the Government's motion to dismiss.

MS. O'CONNOR: No, your Honor.

THE COURT: Could I hear from—

MR. REED: Your Honor, may I renew my comments to the Court? At this point, I've consulted with co-counsel briefly, and we would not have any opposition to the Government moving to dismiss at this time, and we would not oppose that on behalf of Mr. Armstrong.

THE COURT: All right.

MR. BORTMAN: That would be Mr. Mack's position, too, your Honor.

MR. LANNEN: As to Mr. Hampton, your Honor, we would—normally would request a continuance based on the Court's order for a long enough period of time for the Government to comply with the order; otherwise, we would be ready for trial, and if the Government is—if their stance is that they are not going to comply with the Court's order, then we would not oppose and would move for dismissal as to Mr. Hampton.

THE COURT: Let me just hear from Government's counsel at least as to Defendants who are here. I think that Mr. Armstrong needs to be here before the Court can make any final disposition in this case, but as to those who are here, the Government can be heard.

As I understand Counsel, they don't oppose the Government's motion to dismiss, so it sounds like, if the Court were ruling at this time, the Court would be granting that motion.

Government wish to have anything else to say on the record?

MR. CHO: Let me just make the record clear, your Honor. What is going on is the Court has made its ruling or would tentatively make its ruling if Mr. Armstrong were here, and ordered the Government to produce discovery.

Now, the Government's position is that the Government will not comply with such an order and, as a sanction, would recommend to the Court that dismissal be the proper sanction. I recommend that because that would be the normal course of events. The Defense would usually ask that the case be dismissed for noncompliance of the discovery order or some other sanction.

Let me make it clear for the record, however, that if the Defense were to—wanted to proceed to trial without the discovery, the Government would be perfectly willing to go forward with trial without providing such discovery. It's

just that the Government will not provide the discovery and I'm assuming that the Defense would then ask for some sort of sanction and the sanction of dismissal be imposed and that is the sanction that the Government would agree with. That would be the proper one.

THE COURT: One other question, then. If the Government in fact made the motion, and I consider that you have made it, at least as to those Defendants who are here, and the Court did grant that motion, what would be the Government's position as far as the release of the Defendants? I'm sure the Defense Counsel would ask that they be released forthwith. What would the Government's position be?

MR. CHO: No, the Government's position would be that they be detained pending appeal.

Let me just state, your Honor. This is not formally a motion by the Government to dismiss the case because, as the Court is aware, the Government could make that motion at any time. The Government is not making that motion. What the Government is doing is stating to the Court that it will not comply with the Court's discovery order and is suggesting as a sanction, if the Court were to impose such a sanction, that the sanction be dismissal, and that would be for purposes of allowing the Government to have a final order to appeal to the circuit.

The actual technical appeal would be the appeal of the dismissal order from the Court, and appealing that order was improper because it was based upon a—as a sanction for an illegal order. That is the order for compelling discovery.

THE COURT: All right, I think our procedure has changed—procedural posture has changed a little bit.

At first I think Government's counsel clearly said it was the Government's request that the Court dismiss the indictment. Now I think Counsel has made it clear it's not their request that the indictment be dismissed. Their

position is that they will not comply with the Court's order, and now it's on—incumbent upon the Defendants now to decide whether you will make a motion to dismiss as a sanction or ask that some other type of sanction be imposed.

Now, if Defense Counsel feel that you need some time in order to be clear as to what your position should be, then I'd be inclined just to put the case over, to actually trial it until Friday when Mr. Armstrong could be present. Defense Counsel could consult whatever sources need to be consulted and be prepared to advise the Court as to what your position would be.

But as I understand, that's the posture now. The Government is simply indicating it will not comply with the Court's order to provide the discovery that the Court previously ordered.

MR. BORTMAN: Your Honor, we have concurred and decided that, in view of the—

MR. REED: Speak for yourself.

MR. BORTMAN: Oh, I'm sorry—I thought we had agreed here.

(Pause to confer.)

MR. BORTMAN: I believe we have, your Honor, to—in view of the Government's position, to move for a dismissal at this time.

MR. REED: And I would move for a dismissal under circumstances where I believe sincerely that I can obtain a waiver of personal appearance from Mr. Armstrong at a later point and file it; for purposes of my having the power to make that motion on behalf of Mr. Armstrong this morning, I vehemently believe that the case should be dismissed. The Government is clearly refusing to comply with what appears to be very simple statistics that they can obtain.

So we sincerely ask the Court to dismiss the indictment at this time.

MR. LANNEN: On behalf of Mr. Hampton, your Honor, based on the Court's order and the Government's refusal to comply with the order, we would move that the Court dismiss the indictment against Mr. Hampton.

MS. O'CONNOR: Your Honor, on behalf of Mr. Martin, we would also move for a dismissal of the indictment based on the Government's failure to comply.

THE COURT: All right. I'm not going to rule on Mr. Armstrong's. I do feel that Mr. Armstrong either needs to be present or we need to have a waiver prior to the Court issuing its ruling.

I don't see any reason why the Court cannot go—rule on the motion made by the other Defendants and then go on to discuss the question of whether the Defendants should be detained pending appeal or whether they should be released or whether bail motions need to be made, and if the Government sees any reason why the Court should not proceed as to the other Defendants today, you might so indicate.

In other words, I won't proceed with Mr. Armstrong's today, but I see no reason why the Court could not proceed relative to the motions made by the other Defendants.

MR. CHO: The motion for dismissal—I think that'd be fine, your Honor.

THE COURT: All right, then the Court does grant the Defendants' motion to dismiss. The basis for the Court's granting the motion to dismiss—the Court believes that there is no other sanction that could be imposed. The Court believes that the discovery requested should be turned over by the Government. It's clear that Government's counsel will not produce the discovery.

The Court cannot see any other sanction that could be imposed against the Government other than a dismissal of the case, and for that reason the Court will grant the motions made by the other three Defense Counsel—or the other counsel representing those Defendants who are present today.

Now, the next question is the question of—the Government has indicated that it would ask for a stay of execution for appeal purposes, at least for the 48-hour period, and that the Defendants remain detained during that period. That is the Government's request, correct?

MR. CHO: That's correct, your Honor.

THE COURT: Defense Counsel—

MR. BORTMAN: Of course, your Honor—understand that my client is on bond.

THE COURT: Okay. As far as those that are on—that are detained, the question still has to be answered.

MS. O'CONNOR: Your Honor, on behalf of Mr. Martin, I would ask for forthwith release. Mr. Martin has been detained for seven months on a case where there is flimsy evidence—frankly, I think an unconscionable case where the Government is seeking a 35-year mandatory minimum on someone with virtually no evidence to tie him in now that the one informant has died who perhaps could have provided some evidence.

He was unable to find anyone who could post property for him. He does not come from those kind of circumstances. Now his uncle has indicated he would be willing to sign a bond for him. I was able to contact him.

Nevertheless, I think, based on the lack of evidence against Mr. Martin, a forthwith release is certainly applicable in his case, and we would request that today.

MR. LANNEN: Your Honor, on behalf of Mr. Hampton, I would also ask for a forthwith release. He has also been in custody for seven months. He has grown up in Los Angeles. His grandfather is in court today. His father is in court today. They are supporting him through this whole proceeding. He has a place to go.

The Government is refusing the Court's order and therefore instituting an appeal which will probably take a minimum of six months and could take twice or even longer than that, as we're all aware.

I don't think that Mr. Hampton is a flight risk. Basically, his family, although they are supportive and are upright citizens in the community, cannot really afford to post a bail or at least a very high bail on his behalf, and so I would request a release of Mr. Hampton pending appeal with conditions if the Court were to give it—any conditions through the Pretrial Services Department.

THE COURT: What about those—I think there are two Defendants whose counsel are not here today.

MR. LANNEN: Oh, I'm also—yes, your Honor. I would—I'm standing in for Joe Walsh on Mr. Rozelle. I'd actually have to get a little more information from Mr. Walsh on his behalf as far as a bail review.

I would ask, for the record, for his forthwith release also based on the fact that he's been in custody for seven months and that he will be in custody for a long period of time while this appeal is processed.

MS. O'CONNOR: Your Honor, if I might just add again on Mr. Martin's behalf, but also Mr. Rozelle is his brother, and so I am somewhat aware of the family circumstances. These are both lifetime members of the Los Angeles community.

When I spoke to Mr. Martin's uncle, also related to Mr. Rozelle, he said frankly Mr. Martin wouldn't know how to get out of Los Angeles County. I don't think they're a flight risk at all.

I'm not aware of Mr. Rozelle's specifics in terms of his arrest history and whatnot. I am aware of Mr. Martin's which consists of a misdemeanor arrest for illegally entering his girlfriend's apartment in the past and possession of a BB gun. He does not have any violent history, anything like that, and again, as I say, I don't believe he is a flight risk. The entire family is here.

THE COURT: What was the bail set in Mr. Martin's case?

MS. O'CONNOR: There is no bail set, your Honor.

THE COURT: The Government requested detention?

MS. O'CONNOR: Yes, your Honor.

THE COURT: And the detention hearing was originally held by the magistrate?

MS. O'CONNOR: I believe so, your Honor.

THE COURT: And was there a review by this Court?

MS. O'CONNOR: No, your Honor, we did not have a review—because of the 35-year mandatory minimum hanging, we felt it would probably necessitate property, and we could not find anyone.

As I say, the uncle is willing to sign an appearance bond if the Court should set that.

THE COURT: And how about Mr. Hampton and—well, just Mr. Hampton. Was bail set in his case?

MR. LANNEN: Your Honor, bail was not set. He was detained. It was not heard by this Court, and again, although Mr. Hampton does face considerable time in this case, it might be worth pointing out that he is called in the indictment a runner in the case, the lowest level on the ring, and also I would add that either his father or his grandfather or both would sign the appearance bond on his behalf.

MR. REED: David Reed for Mr. Armstrong. I understand the Court's concern about having Mr. Armstrong present for the formal request for the dismissal on his behalf, but in view of the fact that he is sick and in view of the fact that the Government—rather, the Court may be inclined to dismiss the case, I would ask on behalf of Mr. Armstrong for the Court to issue a forthwith release on behalf of him as well.

Now, if the Court—I don't know what the Court's position is going to be concerning the stay, et cetera, but if the Court is not inclined to issue the forthwith release, then certainly I would like to have this case put on calendar for a bail motion within the next few days, possibly Friday.

THE COURT: Let me ask Government's counsel—for what purpose is the stay? As I understand it, Counsel is

asking for a stay for 48 hours. Is it for a purpose of filing the notice of appeal with the Ninth Circuit or for making a decision within the U.S. Attorney's Office as to whether an appeal will be pursued?

MR. CHO: Well, it's both, your Honor. We have to have formal clearance from the Attorney General's office in Washington, and we'll work on that right away to get permission to do so.

And then the appeal—formal notice of appeal would have to be filed as well.

THE COURT: And is it the Government's position that you believe that the notice of appeal could be filed within the 48-hour period?

MR. CHO: Yes, your Honor.

THE COURT: Government wish to be heard any further?

MR. CHO: Yes, with regard to the forthwith release if the Court would want to hear argument.

THE COURT: You know, I don't. Since I have not reviewed any information about these Defendants and have not looked at the evidence that would be offered at trial, that's why I asked Counsel if there had been a bail review before this Court. I would not be inclined to order any of the Defendants released at this point.

What I would be inclined to do is to put the case back on calendar for a further hearing—a bail hearing, and at that point I would ask for a report from Pretrial Services, then this Court would have an opportunity to review all of the information that you're talking about now, but I really don't—have not reviewed any background information on any of the Defendants.

MR. CHO: I would concur with that, your Honor.

THE COURT: All right. What the Court's inclined to do at this point, as far as Mr. Armstrong is concerned, he does have to be present in order for the Court to rule on his counsel's motion to dismiss or either have a waiver on file,

but he would still have to be present for the Court to entertain counsel's motion to release or to set bond or whatever. I would need him present for that purpose because, if I were inclined to order his release, I would want to impose conditions and he would need to be present for that. So I think he does have to be present.

I don't know how—what his medical condition is and when he could actually appear before the Court, but I would be inclined to continue the case until Friday as Counsel requests and hopefully by that time we'll at least have some additional information as far as Mr. Armstrong is concerned.

As far as Mr. Martin is concerned and the other Defendants, I would grant the Government's request for a stay for 48 hours and would place the cases of the other Defendants on calendar for bail hearing at a time and date that—at a time that counsel feels would be appropriate, so I don't know if Friday is the best day for everyone, or if you would ask for an earlier date.

MS. O'CONNOR: We would ask for Friday, your Honor, if that's possible—either Thursday or Friday would be fine.

THE COURT: Okay. That would be as to Mr. Martin, as to Mr. Hampton, and then also as to Mr. Rozelle, so counsel should advise Mr. Rozelle's counsel that he needs to be present for such a hearing.

Is Friday good for everyone?

MR. LANNEN: Friday is good for Mr. Hampton, your Honor. I believe Mr. Walsh said that he believes that he will be in trial up till about next Tuesday, so I don't know if the Court wants to put him on calendar for Friday on the chance that he could be available or if the Court would like him to just put it on calendar himself.

THE COURT: I'd be inclined to set them all on the same day and then, if for some reason he can't be present, counsel will have more information as to what date he requests that the Court consider his matter.

MR. LANNEN: Fine.

THE COURT: Government's counsel?

MR. CHO: I have a problem with that, your Honor. I have two appeals that have to be filed by next Monday, the 11th. I would prefer to have it heard perhaps next Tuesday.

Also, I would have to have—since we're apparently going to have a bail hearing on all the Defendants, I'd have to have time to get together with the agent and pull together all the evidence necessary for a full bail hearing.

For a status conference on Friday, just to see where we're at, to formally dismiss Defendant Armstrong, no problems with the Government there, but to have a full-blown detention hearing on all Defendants, I would ask that that be put off till next week.

MS. O'CONNOR: Your Honor, I would object to the continuance. The Government was supposed to be ready for trial today. Presumably they have all the information they're ever going to have on these Defendants. I have appeals due myself, but I think it's an urgent matter. Mr. Martin's been in custody for seven months, and again particularly given the state of the evidence against him, I would ask for Friday.

MR. CHO: Your Honor—

THE COURT: I was trying to hear from other Defendants. I think I've heard from everybody now. Mr. Mack is already on bond, and the Court has granted his motion to dismiss, but have also granted the Government's request for a stay of execution for 48 hours, so there's nothing, I think, to do as far as Mr. Mack is concerned.

Now, there is no date when Mr. Mack is ordered to return to receive any additional information from the Court, and I don't know what Government's position might be in that regard.

In other words, if in fact the Government files the notice of appeal, the Government will probably be making some additional request of the Court. Mr. Mack is on bond

already, but no date—not been given any date as to when he needs to return.

MR. CHO: I guess Mr. Mack would remain—the Government would request that Mr. Mack remain out on bond pending the appeal, and that the conditions remain the same.

I guess if and when a decision is made before the Ninth Circuit, obviously his counsel will be notified if there's an argument before the Ninth Circuit. Certainly whatever the ruling is, we'll certainly have to come back to the Court on remand and he can be ordered back at that time.

THE COURT: All right, as to Mr. Mack, then, the Court would order—has granted the motion to dismiss, ordered that he remain on bond under the same terms and conditions that were initially imposed and as far as further appearances in court, his counsel will be notified and can notify him of when he next needs to appear.

MR. BORTMAN: Thank you, your Honor.

THE COURT: Could I have Mr. Mack stand, please? Mr. Mack, you should understand that your case has been dismissed. The Government will probably appeal this Court's ruling. Once the Ninth Circuit rules, the circuit could reverse the Court. If it does reverse the Court, then you would have to come back to trial in the case.

The circuit also might order—might affirm and order that the Government disclose the information that the Court has ordered and, if that were to happen, then there would be motions probably filed by counsel in the case, so you would still have to return.

So at this point you're still on bond under the same terms and conditions that were originally imposed, and your counsel will notify you when you are to return to the Court.

DEFENDANT MACK: Yes, ma'am.

THE COURT: As to the other Defendants, the Court would continue their cases until Friday, and I need some assistance from Mr. Levario as to the time.

THE CLERK: 10:00 o'clock, your Honor.

THE COURT: 10:00 o'clock on Friday for status conference, further hearing, bail review as well.

MS. O'CONNOR: Thank you, your Honor.

MR. REED: Your Honor, can that be a bail review on behalf of Mr. Armstrong as well?

THE COURT: I'm saying for everybody it will be the same. If Mr. Armstrong isn't here on Friday, then of course we won't have the bail review, but if he is present, then we will proceed with the bail review.

MR. REED: Thank you, your Honor.

MS. O'CONNOR: Thank you, your Honor.

(Proceedings concluded at 10:30 a.m.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Transcriber

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
Case Number 92-338-CR

UNITED STATES OF AMERICA
Plaintiff,
vs.
CHRISTOPHER LEE ARMSTRONG, et al
Defendant.

NOTICE OF APPEAL
93-50031

Notice is hereby given that UNITED STATES OF AMERICA hereby appeals
to the United States Court of Appeals for the Ninth Circuit from
Name of Appellant

CRIMINAL MATTER
[] Conviction only (F.C.Cr.P. 32(b))
[] Conviction and Sentence
[] Sentence only (18 U.S.C. 3742)
[] Order (specify)
Order Dismissing Indictment as to defendants
KARON HAMPTON, ROBERT KOSKOFF, FREDDIE
MARK, and Sharon Annen Harris
[] Sentence Imposed:
[] Bail Status: Currently detained except
for defendant MARK ONE is out on \$50,000
bond

CIVIL MATTER
[] Order (specify)
[] Judgment (specify)
[] Other (specify)

Entered in this action on
Date Judgment or Order Entered on the Docket Sheet
A copy of said judgment or order is attached hereto.
DATED January 6, 1993
Signature of Appellant or Appellant's Attorney

NOTE: Pursuant to Local Rule 17, the Notice of Appeal shall contain the names of all parties to the judgment or order and the names and addresses of the attorneys for each party. Also, the Clerk shall be furnished a sufficient number of copies of the Notice of Appeal to permit prompt compliance with the service requirements of Rule 3(d), F.R.App.

4-2 (04/89) NOTICE OF APPEAL

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263

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FILED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Plaintiff.

CHRISTOPHER LEE ARMSTRONG Defendant.

Case Number 92-336-CDH

NOTICE OF APPEAL

93-50057

Notice is hereby given that UNITED STATES OF AMERICA hereby appeals to the United States Court of Appeals for the Ninth Circuit from

CRIMINAL MATTER

[] Conviction only (P.C.Cr.P. 32(b))

[] Conviction and Sentence

[] Sentence only (18 U.S.C. 3742)

[x] Order (specify)
Order dismissing indictment as to defendant Armstrong

[] Sentence imposed:

[x] Bail Status: Detained

CIVIL MATTER

[] Order (specify)

[] Judgment (specify)

[] Other

Entered in this action on 1/19/93
Date Judgment or Order Entered on the Docket Sheet

A copy of said judgment or order is attached hereto.

DATED January 20, 1993
Signature of Appellant or Appellant's Attorney

NOTE: Pursuant to Local Rule 17, the Notice of Appeal shall contain the names of all parties to the judgment or order and the names and addresses of the attorneys for each party. Also, the Clerk shall be furnished a sufficient number of copies of the Notice of Appeal to permit prompt compliance with the service requirements of Rule 31(d), P.S.App.

A-2 (04/89)

NOTICE OF APPEAL

JAN 21 1993

158

SUPREME COURT OF THE UNITED STATES

No. 95-157

UNITED STATES, Petitioner

v.

CHRISTOPHER LEE ARMSTRONG, ET AL.

ORDER ALLOWING CERTIORARI.

FILED OCTOBER 30, 1995.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

October 30, 1995

(6)

Supreme Court, U.S.

FILED

DEC 14 1995

No. 95-157

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER LEE ARMSTRONG, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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439W

QUESTION PRESENTED

Whether the court of appeals erred in holding that evidence that members of a particular race have been prosecuted for a particular offense is sufficient to justify an order requiring discovery from the government on a claim of selective prosecution, absent evidence that similarly situated persons of a different race have not been prosecuted for that offense.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Summary of argument	11
Argument:	
Discovery on a claim of selective prosecution on the basis of race may not be ordered absent evidence that similarly situated persons of a different race have not been prosecuted	15
A. A defendant seeking discovery on a claim of selective prosecution must make a substantial threshold showing	16
B. The showing to obtain discovery must include some evidence that similarly situated persons have not been prosecuted	21
C. The court of appeals' reasons for eliminating the similarly situated offender requirement are unsound	28
Conclusion	38

TABLE OF AUTHORITIES

Cases:

<i>Ah Sin v. Wittman</i> , 198 U.S. 500 (1905) ...	14, 32, 33, 34
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975)	36
<i>Attorney General v. Irish People, Inc.</i> , 684 F.2d 928 (D.C. Cir. 1982), cert. denied, 459 U.S. 1172 (1983)	18, 22, 29
<i>Basic Inc. v. Levinson</i> , 485 U.S. 224 (1988)	30
<i>Bordenkircher v. Hayes</i> , 434 U.S. 357 (1978)	16
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	20
<i>C.E. Carlson, Inc. v. SEC</i> , 859 F.2d 1429 (10th Cir. 1988)	24
<i>Cobbledick v. United States</i> , 309 U.S. 323 (1940)	17
<i>Cooter & Gell v. Hartman Corp.</i> , 496 U.S. 384 (1990)	36

IV

Cases—Continued:

	Page
<i>DiBella v. United States</i> , 369 U.S. 121 (1962)	17
<i>Hazelwood School District v. United States</i> , 433 U.S. 299 (1977)	32
<i>Heckler v. Chaney</i> , 470 U.S. 821 (1985)	16
<i>Imbler v. Pachtman</i> , 424 U.S. 409 (1976)	19
<i>Marshall v. Jerrico, Inc.</i> , 446 U.S. 238 (1980)	16
<i>McCleskey v. Kemp</i> , 481 U.S. 279 (1987) ...	18, 29, 31, 32
<i>Oyler v. Boles</i> , 368 U.S. 448 (1962)	17
<i>Personnel Administrator of Massachusetts v.</i> <i>Feeney</i> , 442 U.S. 256 (1979)	18
<i>Ponzi v. Fessenden</i> , 258 U.S. 254 (1922)	16
<i>Town of Newton v. Rumery</i> , 480 U.S. 386 (1987)	16, 17, 29
<i>Turner v. United States</i> , 396 U.S. 398 (1970)	30
<i>United States v. Adams</i> , 870 F.2d 1140 (6th Cir. 1989)	26
<i>United States v. Armstrong</i> , 48 F.3d 1508 (9th Cir. 1995)	34
<i>United States v. Bassford</i> , 812 F.2d 16 (1st Cir.), cert. denied, 481 U.S. 1022 (1987)	18
<i>United States v. Batchelder</i> , 442 U.S. 114 (1979) .	16, 17
<i>United States v. Bourgeois</i> , 964 F.2d 935 (9th Cir.), cert. denied, 113 S. Ct. 290 (1992)	8, 25, 26
<i>United States v. Burr</i> , 25 F. Cas. 30 (C.C. Va. 1807) (No. 14,692d)	36
<i>United States v. Chemical Foundation, Inc.</i> , 272 U.S. 1 (1926)	18, 29
<i>United States v. Cooks</i> , 52 F.3d 101 (5th Cir. 1995)	23, 34
<i>United States v. Diggs</i> , 613 F.2d 988 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980)	27
<i>United States v. Falk</i> , 479 F.2d 616 (7th Cir. 1973)	19
<i>United States v. Fares</i> , 978 F.2d 52 (2d Cir. 1992) .	23
<i>United States v. Goodwin</i> , 457 U.S. 368 (1982)	16

V

Cases—Continued:

	Page
<i>United States v. Gordon</i> , 817 F.2d 1538 (1987), vacated in part on rehearing, 836 F.2d 1312 (11th Cir.), cert. dismissed, 487 U.S. 1265 (1988)	26
<i>United States v. Greenwood</i> , 796 F.2d 49 (4th Cir. 1986)	24
<i>United States v. Gutierrez</i> , 990 F.2d 472 (9th Cir. 1993)	34
<i>United States v. Hazel</i> , 696 F.2d 473 (6th Cir. 1983)	26
<i>United States v. Holmes</i> , 794 F.2d 345 (8th Cir. 1986)	26
<i>United States v. Hoover</i> , 727 F.2d 387 (5th Cir. 1984)	26
<i>United States v. Huff</i> , 959 F.2d 731 (8th Cir. 1992), cert. denied, 113 S. Ct. 162 (1992)	34-35
<i>United States v. Lovasco</i> , 431 U.S. 783 (1977)	17
<i>United States v. Mezzanatto</i> , 115 S. Ct. 797 (1995)	18, 29
<i>United States v. Mitchell</i> , 778 F.2d 1271 (7th Cir. 1985)	24
<i>United States v. Moon</i> , 718 F.2d 1210 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984)	19
<i>United States v. Murdock</i> , 548 F.2d 599 (5th Cir. 1977)	20
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	16
<i>United States v. Parham</i> , 16 F.3d 844 (8th Cir. 1994)	18, 24
<i>United States v. Peete</i> , 919 F.2d 1168 (6th Cir. 1990)	24
<i>United States v. Penagaricano-Soler</i> , 911 F.2d 833 (1st Cir. 1990)	18
<i>United States v. Schmucker</i> , 815 F.2d 413 (6th Cir. 1987)	24
<i>United States v. Steele</i> , 461 F.2d 1148 (9th Cir. 1972)	27

VI

Cases—Continued:

	Page
<i>United States Dep't of Labor v. Triplett</i> , 494 U.S. 715 (1990)	35
<i>Village of Arlington Heights v. Metropolitan Housing Development Corp.</i> , 429 U.S. 252 (1977)	18, 31, 32
<i>Wade v. United States</i> , 504 U.S. 181 (1992)	21
<i>Washington v. Davis</i> , 426 U.S. 229 (1976)	18
<i>Wayte v. United States</i> , 470 U.S. 598 (1985)	12, 16, 17, 18
<i>Weatherford v. Bursey</i> , 429 U.S. 545 (1977)	20
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886)	12, 17, 18, 31, 32, 33

Constitution, statutes and rules:

U.S. Const.:	
Art. II	11
§ 3	16
Amend. VI	19
Amend. XIV (Equal Protection Clause)	32, 34
Speedy Trial Act of 1974, 18 U.S.C. 3161 <i>et seq.</i>	19
18 U.S.C. 924(c)	2
21 U.S.C. 841	3, 6
21 U.S.C. 841(a)(1)	2
21 U.S.C. 846	2, 3, 6
Fed. R. App. P. 45(b)	19-20
Fed. R. Crim. P.:	
Rule 2	19
Rule 16	20
Rule 50	19

Miscellaneous:

<i>United States Sentencing Comm'n, Annual Report 1994</i>	30
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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-157

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER LEE ARMSTRONG, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-67a) is reported at 48 F.3d 1508. The panel opinion of the court of appeals (Pet. App. 68a-104a) is reported at 21 F.3d 1431.

JURISDICTION

The judgment of the en banc court of appeals was entered on March 2, 1995. By order dated June 21, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including July 28, 1995. The petition for a writ of certiorari was filed on July 28, 1995, and was granted on October 30, 1995 (J.A. 237). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

On April 21, 1992, respondents Christopher Lee Armstrong, Robert Rozelle, Aaron Hampton, Freddie Mack, and Shelton Auntwan Martin were indicted in the United States District Court for the Central District of California on charges of conspiring to possess with intent to distribute, and conspiring to distribute, more than 50 grams of cocaine base (crack), in violation of 21 U.S.C. 846. Respondents were also variously charged in four counts with distributing crack, in violation of 21 U.S.C. 841(a)(1), in one count with possessing crack with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and in three counts with using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c). J.A. 60-67.

Respondents, each of whom is black, alleged that the United States Attorney's Office had determined to prosecute them because of their race. They sought discovery from the government to obtain information that they asserted would support that claim. J.A. 68. The district court granted the motion for discovery. J.A. 150-151. It also adhered to that ruling in denying the government's motion for reconsideration. J.A. 216, 217. When the government indicated that it would not comply with the discovery order, the district court dismissed the indictment. J.A. 224-226. A divided panel of the court of appeals reversed, concluding that the district court had abused its discretion in ordering discovery. Pet. App. 68a-104a. On rehearing en banc, the court of appeals, by a 7-4 vote, held that the district court had permissibly ordered discovery. It therefore affirmed the district court's dismissal of the indictment. *Id.* at 1a-67a.

1. From February to April 1992, a task force composed of detectives from the Inglewood, California, police department's Narcotics Division and agents of the federal Bureau of Alcohol, Tobacco, and Firearms (ATF) conducted an investigation into a crack distribution ring. From February 13, 1992, to April 6, 1992, confidential informants made seven different purchases of crack from respondents, totaling approximately 124.3 grams. The informants also reported the use of firearms by respondents during the sales. Pet. App. 69a-70a.

On April 8, 1992, task force agents executed warrants to search the hotel room where the drug sales took place, as well as the residences of some of the respondents. The officers arrested respondents Armstrong and Hampton in the hotel room; they also discovered 9.29 additional grams of crack and a loaded gun. Respondents Mack, Martin, and Rozelle were later arrested pursuant to bench warrants. Pet. App. 70a; J.A. 64.

2. Respondents filed a motion for discovery or dismissal of the indictment, alleging that the government had selected them for prosecution because of their race. In support of their motion for discovery, respondents offered only one item of evidence to substantiate their claim of selective prosecution: an affidavit from a paralegal employed by the Federal Public Defender for the Central District of California. J.A. 68-70. The affidavit stated that, based on a review of all cases closed by the Federal Public Defender's Office during 1991 that involved substantive drug offenses or drug conspiracy offenses in violation of 21 U.S.C. 841 and 846, all of the 24 defendants charged with a crack trafficking offense were black. The government opposed respondents'

motion for discovery, arguing that respondents had failed to establish the threshold showing of selective prosecution required to justify an order compelling discovery. J.A. 149-150.

The district court found that respondents' showing was sufficient to justify discovery. The court stated that the number of cases and the time period covered by the affidavit; the comparable charges involved in each case; and the fact that all the defendants were of the same race required the government to provide an explanation. The court ordered the government: (1) to list all cases from the prior three years in which the government charged both crack and firearms offenses; (2) to identify the race of the defendant in each case; (3) to state whether each case was investigated by federal or state law enforcement authorities or by a joint federal and state effort; and (4) to explain the criteria used by the United States Attorney's Office in deciding whether to bring crack charges in federal court. J.A. 161-162.

The government moved for reconsideration of the court's discovery order. In support of its motion, the government submitted affidavits from the two officers who had investigated this case. Those affidavits stated that race had played no role in the investigation and that the case had been referred for federal prosecution because it involved provable crack and firearms offenses that met the U.S. Attorney's guidelines for federal prosecution. J.A. 75-79. The government also submitted the affidavit of the then-Chief of the Criminal Complaints Section of the United States Attorney's Office, who explained that "[a]ll charging decisions are made on the basis of whether a federal offense that meets this Office's guidelines has occurred, the overall strength of the evidence, the de-

terrence value and federal interest associated with the particular case, the criminal history of the suspects, and other race-neutral criteria." J.A. 80. He further stated that this case met the general criteria because: it involved more than 100 grams of crack, which was in excess of twice the amount necessary for a ten-year mandatory minimum sentence; the case involved multiple sales and multiple defendants, indicating a fairly substantial crack cocaine ring; the case was jointly investigated by federal and state agencies; firearms were used in connection with the drug trafficking; the evidence against respondents, including audio and video tapes of respondents' illegal activities, was strong; respondent Armstrong had made threats against the arresting officers; and several of the respondents had committed prior narcotics and firearms violations. J.A. 81.

In addition, the government submitted an affidavit from the Public Information Officer for the Los Angeles Division of the Drug Enforcement Administration (DEA) and a DEA report on crack. The affidavit stated that, for cultural and historical reasons, particular racial and ethnic groups tend to dominate the distribution of particular drugs. In the officer's experience, black street gangs dominate the distribution of crack in the Los Angeles area. J.A. 73, 74. The DEA report, "Crack Cocaine Overview 1989," detailed the sociological patterns of crack use and distribution in this country. J.A. 84-117. It concluded that Jamaicans, Haitians, and black street gangs dominate the large-scale manufacture and distribution of crack nationwide. J.A. 103.

The government also provided evidence, based on an informal survey of Assistant United States Attor-

neys in the Central District of California, that at least 11 non-black defendants had been indicted on crack charges during the period covered by respondents' affidavit. J.A. 82, 169. Five of those 11 were represented by the Federal Public Defender. J.A. 82, 169. Finally, the government also submitted computerized records showing that from 1989 to 1992 approximately 2,400 defendants had been charged with drug offenses under 21 U.S.C. 841 and approximately 1,700 defendants had been charged with drug conspiracy offenses under 21 U.S.C. 846. J.A. 82.

In response, respondents offered an affidavit from one of respondents' defense attorneys stating that she had spoken to an intake coordinator at a drug treatment center in Pasadena, California, who told her that, based on his experience, there are "an equal number of caucasian users and dealers to minority users and dealers." J.A. 138. A second defense attorney asserted in a declaration that, based on his discussions with judges, prosecutors, and defense attorneys, many non-blacks are prosecuted in state court for crack offenses. J.A. 141. Finally, respondents offered a newspaper article that stated that the federal penalty for crack offenses is higher than the penalty for powder cocaine offenses and that most federal defendants in crack cases nationwide are black. Pet. App. 6a-7a, 33a; J.A. 208-210.

The district court denied the government's motion for reconsideration, stating:

The statistical data provided by [respondents] raises a question about the motivation of the Government which could be satisfied by the Government disclosing its criteria, if there is any

criteria, for bringing this case and others like it in Federal court.

Without the criteria, the statistical data is evidence and does suggest that the decision to prosecute in Federal court could be motivated by race.

J.A. 217. After the government indicated that it would not comply with the court's discovery order, the district court dismissed the indictment. J.A. 224-226.

3. A divided panel of the court of appeals reversed. Pet. App. 68a-104a. The panel held that, to justify discovery on a claim of selective prosecution, a criminal defendant must demonstrate a "colorable basis for believing that 'others similarly situated have not been prosecuted.'" *Id.* at 80a. The panel determined that respondents' 24-case study failed to satisfy that test because it showed only that "others *have* been prosecuted, not that others similarly situated have not." *Ibid.* Without a colorable basis for believing that others similarly situated have not been prosecuted, the panel stated, "the most reasonable conclusion is that the defendant was selected for prosecution because the government believed the defendant committed the offense; the fact that the defendant is a member of a protected class is coincidental." *Ibid.*

Judge Reinhardt dissented. Pet. App. 85a-104a. In his view, a court "must assume * * * that people of *all* races commit *all* types of crimes." *Id.* at 96a. For that reason, Judge Reinhardt concluded that, "[w]here a defendant shows a reasonable statistical basis for the inference that all defendants charged with a particular federal crime over a significant period of time were members of a single race, such a

showing creates, ipso facto, a colorable basis for believing that similarly situated members of other races were not prosecuted." *Id.* at 96a-97a.

4. The court of appeals granted rehearing en banc to resolve a conflict in its cases over the standards governing discovery when a defendant claims selective prosecution. By a 7-4 vote, the court held that the district court had not abused its discretion in ordering discovery in this case. Pet. App. 1a-67a.

The majority first held that a district court has discretion to order discovery on a claim of selective prosecution when "the evidence provides a colorable basis for believing that discriminatory prosecutorial selections have occurred." Pet. App. 8a. Rejecting the view expressed in *United States v. Bourgeois*, 964 F.2d 935, 940 (9th Cir.), cert. denied, 113 S. Ct. 290 (1992), that discovery should be ordered only in the rare case, the en banc court held that the applicable standard does not set a "high threshold" to obtain discovery. Pet. App. 9a. Instead, it requires defendants to produce "some evidence tending to show the essential elements of the claim," a standard that is met when the evidence is "more than frivolous and based on more than conclusory allegations," and when defendants "make good faith efforts to obtain whatever evidence is readily available, as well as to provide whatever evidence is already in their possession." *Id.* at 8a, 12a. Because the court believed that proving a case of selective prosecution is difficult and that the information necessary to support such a claim may be in the government's exclusive possession, the court concluded that a more substantial threshold showing should not be required. *Id.* at 11a-12a. The court also held that, by itself, statistical information concerning whom the government has prosecuted can establish a

prima facie case of race-based selective prosecution. *Id.* at 10a & n.1. Concluding that the standard for obtaining discovery should be lower than that required for a prima facie case, the court held that "inadequately explained evidence of a significant statistical disparity in the race of those prosecuted suffices to show the colorable basis of discriminatory intent and effect that warrants discovery on a selective prosecution claim." *Id.* at 11a.

Applying those standards, the court held that respondents' identification of 24 black crack defendants was sufficient to establish a "disparity," and therefore to warrant discovery. The court stated that, although "such a small number of cases does not conclusively establish either of the elements of selective prosecution * * *, the fact that every single crack defendant represented by the Federal Public Defender in all cases that terminated during 1991 was black provides a colorable basis for believing that the challenged prosecutorial policies are driven by discriminatory motives and yield discriminatory effects." Pet. App. 16a. The government argued that respondents' affidavit failed to establish a disparity and thus was inadequate to justify discovery because it "shows only that blacks have been prosecuted, not that others of different races and similarly situated have not." *Id.* at 18a. The court concluded, however, that it was proper to infer a disparity, despite the absence of a comparison pool, because of a "presumption that people of all races commit all types of crimes." *Id.* at 19a. Otherwise, the court said, "we would be accepting unwarranted racial stereotypes." *Id.* at 19a n.6. The court therefore inferred a showing of racial disparity sufficient to warrant discovery. The court also rejected the government's contention

that no evidence of discriminatory purpose had been presented. Rather, it expressed the view that an unexplained race-based "disparity" is sufficient evidence of discriminatory intent to justify discovery. *Id.* at 25a.

Chief Judge Wallace concurred in the judgment. Pet. App. 28a-31a. He rejected the majority's holding that the discovery threshold in a selective prosecution case should not be "high." In his view, "a high threshold 'is appropriate because courts are ill equipped to assess a prosecutor's charging decisions, and oversight of prosecutorial decisions could undermine effective law enforcement.'" *Id.* at 29a. Nevertheless, he concurred in the result in this case because of his view that an appellate court should not overturn a district court's discovery order absent a clear error in judgment. *Id.* at 29a, 31a.

Judge Rymer, joined by Judges Leavy, T.G. Nelson, and Kleinfeld, dissented. Pet. App. 32a-67a. Judge Rymer summarized her disagreement with the majority as follows:

For the first time in this circuit or any other, the en banc court has held that a raw number of prosecutions, without reference to a comparison group and without evidence that others, similarly situated except for their race, have not been prosecuted, provides a colorable basis for the existence of both discriminatory effect and discriminatory intent sufficient to order discovery from the government in connection with a criminal defendant's selective prosecution defense. Also, though both the Supreme Court and this circuit have made clear that discriminatory effect and discriminatory intent are two different elements,

each of which must exist, the majority's opinion effectively collapses intent into effect by holding that both may be shown by the same, insubstantial statistic. Additionally the opinion has formally removed the "high threshold" that, until now, we explicitly (and other circuits implicitly) have required to be met before discovery relating to a selective prosecution claim can be ordered. In so doing, the majority opinion radically, and unnecessarily, rewrites the law of selective prosecution.

Id. at 32a. Judge Rymer concluded that, in view of the majority's relaxed standard for ordering discovery, government resources that would better be spent on prosecuting crime will instead be devoted to "chasing statistics." *Id.* at 67a.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that discovery on a claim of selective prosecution may be ordered based solely on evidence that members of a particular race have been prosecuted, without any evidence that similarly situated persons of a different race have not been prosecuted.

A. The government has broad prosecutorial discretion, and courts are properly reluctant to subject particular exercises of that discretion to scrutiny. The reasons are that prosecutorial discretion is a core element of the Executive's power under Article II; courts are ill-equipped to evaluate the many factors that affect the decision to prosecute; judicial inquiry into a prosecutor's decisions can chill law enforcement; and judicial scrutiny of charging decisions diverts a criminal proceeding from its central purpose: determining whether the defendant is

guilty of the charges against him. *Wayte v. United States*, 470 U.S. 598, 607 (1985).

Prosecutorial discretion is nonetheless subject to equal protection limits. The Constitution is violated when a defendant establishes that (1) similarly situated persons of a different race have not been prosecuted and (2) the difference in treatment is motivated by race. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886). Because of the unique considerations implicated by judicial inquiry into an exercise of prosecutorial discretion, however, a defendant must show both elements of a selective prosecution claim through exceptionally clear proof.

The special considerations involved when courts review a substantive claim of selective prosecution also bear on the standard for obtaining discovery from the government on a claim of selective prosecution. In order to avoid encroachment into an area that the Constitution reserves to the Executive Branch, and unwarranted litigation on an issue that is collateral to the defendant's guilt, judicial inquiry should not even begin until there is a substantial and concrete basis for suspecting unconstitutional conduct. Accordingly, discovery on a claim of race-based selective prosecution may not be ordered unless a criminal defendant makes a "substantial threshold showing" both that similarly situated persons of a different race have not been prosecuted and that the difference in treatment is motivated by a racially discriminatory intent.

B. Because proof of improper selection is an indispensable element of a selective prosecution claim, a criminal defendant must introduce solid and credible evidence on it at the discovery stage. Accordingly, the courts of appeals have uniformly held that

discovery on a claim of selective prosecution is unwarranted unless a defendant makes a threshold showing of "selection," i.e., that similarly situated persons were not prosecuted.

The requirement that a defendant make a showing that similarly situated persons have not been prosecuted is easily administered by courts. It is therefore a particularly practical way to identify those few cases worthy of further judicial inquiry. At the same time, because evidence concerning similarly situated offenders is not in the government's exclusive possession, requiring criminal defendants to introduce such evidence will not cut off meritorious claims prematurely.

Under the correct legal standard, respondents' evidence that all of the 24 crack prosecutions closed by the Federal Public Defender in 1991 involved black defendants was insufficient to justify a discovery order. It demonstrates only that blacks have been prosecuted, not that others similarly situated have not. The district court therefore acted on the basis of an incorrect understanding of law and consequently abused its discretion in ordering discovery.

C. In upholding the discovery order in this case, the Ninth Circuit dispensed with any requirement to show that similarly situated offenders were not prosecuted. Its reasons for diluting the required showing, however, are unsound.

The court of appeals concluded that race-based selective prosecution claims differ from other selective prosecution claims: according to the court, defendants alleging selection based on race may rely on a legal presumption that people of all races commit all types of crimes. But a showing that similarly situated offenders have not been prosecuted is an indispensable

element of a selective prosecution claim, and that is no less true when the ground of selection is alleged to be race. The court of appeals' presumption also runs counter to the settled rule that the government is presumed to act in good faith; that presumption can only be overcome by proof of specific facts. And the requirement that a defendant show that similarly situated persons have not been prosecuted does not accept racial stereotypes. Requiring such proof instead recognizes the possibility that, for socioeconomic and historical reasons, members of particular groups may predominate in the commission of certain crimes.

The court of appeals also erred in relying on cases holding that statistical disparities can establish a *prima facie* case of discriminatory effect and intent. Under those cases, a disparity does not exist simply because those prosecuted are predominantly of one race. Rather, a disparity exists only when there is a significant difference between the composition of the group prosecuted and the composition of the group eligible for prosecution, a showing that necessarily requires proof that others who are similarly situated have not been prosecuted. The Court's decisions in *Yick Wo* and *Ah Sin v. Wittman*, 198 U.S. 500 (1905), confirm the importance of evidence that similarly situated persons of a different race have not been prosecuted in cases that rely on statistics. In *Yick Wo*, evidence concerning similarly situated offenders was presented, and a violation was found. In *Ah Sin*, no allegation concerning similarly situated offenders was made, and the Court found the claim insufficient as a matter of law.

The court of appeals' concern that defendants who have potentially meritorious claims may be unable

to prove them without discovery is insufficient to change the discovery standard. If there were any substance to respondents' assertion of selective prosecution, they should have had no difficulty producing concrete evidence that similarly situated non-blacks were being prosecuted in the state criminal justice system.

Finally, the principle that a district court's discovery orders are reviewed under an abuse of discretion standard does not affect the analysis in this case. A district court must exercise its discretion in accordance with a correct understanding of the law. Because the district court ordered discovery under an incorrect legal approach, its decision constituted an abuse of discretion.

ARGUMENT

DISCOVERY ON A CLAIM OF SELECTIVE PROSECUTION ON THE BASIS OF RACE MAY NOT BE ORDERED ABSENT EVIDENCE THAT SIMILARLY SITUATED PERSONS OF A DIFFERENT RACE HAVE NOT BEEN PROSECUTED

The court of appeals held that trial courts may order discovery on a claim of selective prosecution based solely on evidence that persons of a particular race have been prosecuted for a particular offense, without any evidence that similarly situated persons of a different race have not been prosecuted. For reasons that follow, that holding is incorrect. Except in cases involving direct admissions by officials of discriminatory purpose, a defendant seeking discovery on a claim of selective prosecution based on race must present evidence establishing that similarly situated persons of a different race have not been prosecuted. Because no such showing was made

in this case, the district court's exercise of its discretion in ordering discovery rested on an erroneous understanding of the law.

A. A Defendant Seeking Discovery On A Claim Of Selective Prosecution Must Make A Substantial Threshold Showing

1. A prosecutor has broad discretion in the enforcement of the criminal laws. "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *Wayte v. United States*, 470 U.S. 598, 607 (1985) (quoting *Bordenkircher*); see also *Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987) (opinion of Powell, J.); *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980); *United States v. Batchelder*, 442 U.S. 114, 124 (1979). That principle is founded on several important considerations. First, prosecutorial discretion is a core element of the Executive's power to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *United States v. Nixon*, 418 U.S. 683, 694 (1974); *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922). Separation-of-powers principles therefore constrain judicial review of prosecutorial decisions. Second, "the decision to prosecute is particularly ill-suited to judicial review." *Wayte*, 470 U.S. at 607. The factors that the government must consider in deciding to prosecute, such as the strength of the case, the general deterrence value, and the government's enforcement priorities, "are not

readily susceptible to the kind of analysis the courts are competent to undertake." *Ibid.* Third, judicial review of prosecutorial decisionmaking "threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Ibid.* See also *Town of Newton*, 480 U.S. at 396 (opinion of Powell, J.); *United States v. Lovasco*, 431 U.S. 783, 793-794 (1977). Finally, judicial scrutiny of a prosecutor's charging decisions imposes high costs on the criminal justice system. The purpose of a criminal proceeding is to determine a defendant's guilt or innocence, and examination of the prosecutor's reasons for bringing a prosecution diverts the proceeding from that central issue, resulting in delay that can be "fatal to the vindication of the criminal law." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940). See also *DiBella v. United States*, 369 U.S. 121, 126 (1962). Those factors "make the courts properly hesitant to examine the decision whether to prosecute." *Wayte*, 470 U.S. at 608.

Although prosecutorial discretion is broad, it is subject to constitutional constraints. In particular, the decision to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962); accord *Wayte*, 470 U.S. at 608; *Batchelder*, 442 U.S. at 125. "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, * * * the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886).

Claims of selective prosecution are governed by "ordinary equal protection standards." *Wayte*, 470 U.S. at 608. Absent proof of an explicit discriminatory classification, a criminal defendant alleging selective prosecution based on race must therefore show that (1) persons of a different race in "similar circumstances" have not been prosecuted and (2) the difference in treatment is motivated by an intent to discriminate against members of the defendant's race. *Yick Wo*, 118 U.S. at 374. As the Court stated in *Wayte*, 470 U.S. at 608, a criminal defendant must demonstrate both a "discriminatory effect" and a "discriminatory purpose." See *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-265 (1977); *Washington v. Davis*, 426 U.S. 229, 239-241 (1976). Because of the special considerations implicated by judicial inquiry into an exercise of prosecutorial discretion, those two elements of the claim must be satisfied by "exceptionally clear proof." *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987). In the absence of such proof, courts must presume that a prosecution for violation of a criminal law has been undertaken in good faith for the purpose of bringing offenders to justice. *United States v. Mezzanatto*, 115 S. Ct. 797, 806 (1995); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926); *United States v. Parham*, 16 F.3d 844, 846 (8th Cir. 1994); *United States v. Penagaricano-Soler*, 911 F.2d 833, 837 (1st Cir. 1990); *United States v. Bassford*, 812 F.2d 16, 19 (1st Cir.), cert. denied, 481 U.S. 1022 (1987); *Attorney General v. Irish People, Inc.*, 684 F.2d 928, 947 (D.C. Cir. 1982), cert. denied, 459 U.S. 1172 (1983);

United States v. Falk, 479 F.2d 616, 620 (7th Cir. 1973) (en banc).

2. The same considerations that make courts reluctant to examine exercises of prosecutorial discretion and that require exceptionally clear proof to establish a claim of unconstitutional selective prosecution also determine the standard that should govern discovery on such a claim. In order to avoid judicial encroachment into an area that the Constitution reserves to the Executive Branch, judicial inquiry into a prosecutor's reasons for bringing a prosecution should not even begin unless there is a substantial and concrete basis for suspecting unconstitutional action. That prerequisite to judicial inquiry is especially important because criminal defendants often "transform [their] resentment at being prosecuted into the ascription of improper and malicious actions to the [government's] advocate." *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976). Absent threshold screening to prevent abuses, defendants would be able to employ claims of selective prosecution and associated discovery demands as powerful tools to divert a prosecutor's "energy and attention * * * from the pressing duty of enforcing the criminal law," *ibid.*, and to delay the resolution of criminal charges against them. See *United States v. Moon*, 718 F.2d 1210, 1230 (2d Cir. 1983) ("Unwarranted judicial inquiries" into prosecutorial motive "undermine the strong public policy that resolution of criminal cases not be unduly delayed by litigation over collateral matters."), cert. denied, 466 U.S. 971 (1984).¹

¹ The Sixth Amendment guarantee of a speedy trial, the federal Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, Rules 2 and 50 of the Federal Rules of Criminal Procedure, and Rule

Accordingly, before obtaining discovery on a claim of selective prosecution, a criminal defendant is required to make a substantial threshold showing on each element of the claim. By requiring a significant threshold showing, courts may avoid unwarranted and highly intrusive inquiries into a prosecutor's judgment about why it was important to bring a case. At the same time, that standard will serve to prevent the needless diversion of government and judicial resources from the adjudication of a criminal case to the disposition of a selective prosecution motion.

45(b) of the Federal Rules of Appellate Procedure all provide for the prompt disposition of criminal cases. Because of the important public policy of expediting the resolution of criminal charges, the right to discovery in criminal cases is sharply limited. "There is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Due process requires the government to disclose exculpatory evidence that is material to guilt or punishment (*Brady v. Maryland*, 373 U.S. 83 (1963)), but the Federal Rules of Criminal Procedure, primarily Rule 16, otherwise govern the extent of discovery in criminal cases. Rule 16 contains specified categories of information subject to disclosure by the prosecution and defense, requiring in general that those items subject to discovery must be relevant and material to the defense of the criminal charges. Permitting discovery on claims of selective prosecution where there has not been a substantial threshold showing would undermine that policy and allow criminal defendants to circumvent the limitations on discovery built into the Federal Rules. See *United States v. Murdock*, 548 F.2d 599, 600 (5th Cir. 1977) (a threshold showing of selective prosecution is required because "[t]o hold otherwise would encourage the assertion of such defense, no matter how spurious, as a means of burdening criminal trials with massive discovery of material completely irrelevant and immaterial to the defendant's case").

The Court's decision in *Wade v. United States*, 504 U.S. 181 (1992), supports that approach. In *Wade*, the Court considered whether a court may review a claim that the government unconstitutionally refused to file a motion for a departure from a mandatory minimum sentence based on the defendant's substantial assistance to the prosecution, and, if so, what showing a criminal defendant must make to obtain discovery on that claim. The Court held that such a discretionary decision should be treated no differently from a prosecutor's other decisions and that district courts therefore have authority "to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive." *Id.* at 185-186. The Court then noted the defendant's concession that, in order to obtain discovery on such a claim, the defendant was required to make a "substantial threshold showing" of an unconstitutional motive. *Id.* at 186. Because the defendant had failed to make such a showing, the Court held that discovery was properly denied. *Id.* at 186-187. In *Wade*, as here, the requirement of a substantial threshold showing properly balances the interest of courts in protecting the equal protection rights of individuals with the necessary judicial hesitance to explore the motives of prosecutors in bringing a criminal case.

B. The Showing To Obtain Discovery Must Include Some Evidence That Similarly Situated Persons Have Not Been Prosecuted

A key threshold requirement that a defendant must meet in the selective prosecution context is the presentation of concrete evidence on both elements of a selective prosecution claim, including a threshold

showing of "selection," i.e., that others who are similarly situated have not been prosecuted. That principle has been uniformly recognized and applied in the courts of appeals.

In *Attorney General v. Irish People, Inc.*, 684 F.2d 928, 932 (1982), cert. denied, 459 U.S. 1172 (1983), the D.C. Circuit articulated the governing principles with particular clarity. There, the court held that, in order to obtain discovery from the government on a claim of selective prosecution, a defendant must not only introduce evidence of improper motive, but must also "make a colorable showing that he has been especially singled out, that there exist persons similarly situated who have not been prosecuted." 684 F.2d at 946. The court reasoned that "a demonstration of selection is indispensable for the defense and * * * the burden of so demonstrating lies squarely on the defendant." *Ibid.* It explained that "[i]f, as the district court found, there was no one to whom defendant could be compared in order to resolve the question of selection, then it follows that defendant has failed to make out one of the elements of its case. Discrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances." *Ibid.* The court made clear that evidence that there are similarly situated offenders is essential not only to prove a claim of selective prosecution, but also to obtain discovery on such a claim (*id.* at 947-948 (footnote omitted)):

[W]e can see no reason for throwing out half the standard on the discovery issue. If either part of the test is failed, the defense fails; thus it makes sense to require a colorable claim of both before subjecting the Government to discovery. Since it

is well established that, even in the context of a criminal prosecution, the Government enjoys a presumption of having "undertaken [the action] in good faith and in nondiscriminatory fashion," it also makes sense that the burden be generally on the defendant to show the necessary elements at each procedural stage.

The court's analysis in *United States v. Cooks*, 52 F.3d 101, 105 (5th Cir. 1995), a case similar to the present one, also illustrates the correct approach. There, a defendant prosecuted for conspiring to distribute more than 50 grams of crack sought discovery on a claim that blacks were selectively prosecuted in federal rather than state court. In support of that request, the defendant introduced statistical evidence that the overwhelming majority of those arrested for possession of crack are black and that such arrests have increased tenfold in recent years. *Ibid.* The Fifth Circuit held that discovery was properly denied because the statistical evidence "fail[ed] to satisfy the first prong of the selective prosecution inquiry; it d[id] not establish that white defendants committing this offense were prosecuted in state rather than federal court." *Ibid.*

The Second, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits have all similarly held that discovery may not be ordered against the government on a claim of selective prosecution absent a threshold showing on both elements of the claim. Those circuits have therefore affirmed district court decisions denying discovery where the defendant failed to make a threshold showing that similarly situated persons were not prosecuted. See *United States v. Fares*, 978 F.2d 52, 59-60 (2d Cir. 1992) (no abuse of discretion in

refusing to order discovery where defendant did not offer "evidence as to large numbers of similarly situated persons known to the government who had not been prosecuted"); *United States v. Greenwood*, 796 F.2d 49, 52-53 (4th Cir. 1986) (discovery properly denied because defendant failed to make nonfrivolous showing that he had been singled out while others who were similarly situated had not been prosecuted); *United States v. Peete*, 919 F.2d 1168, 1176 (6th Cir. 1990) (discovery properly denied because defendant, "aside from his own self-serving affidavit and an affidavit from his counsel, did not point to any evidence that others similarly situated were not prosecuted"); *United States v. Schmucker*, 815 F.2d 413, 418-419 (6th Cir. 1987) (without any evidence of others similarly situated who were not prosecuted, defendant not entitled to discovery); *United States v. Mitchell*, 778 F.2d 1271, 1277 (7th Cir. 1985) (to compel discovery, defendant must show colorable basis for selective prosecution claim, which must include some evidence that defendant was singled out for prosecution while others were not); *Parham*, 16 F.3d at 846-847 (8th Cir.) (discovery properly denied because, "[w]here a defendant cannot show anyone in a similar situation who was not prosecuted, he has not met the threshold point of showing that there has been selectivity in prosecution"); *C.E. Carlson, Inc. v. SEC*, 859 F.2d 1429, 1437-1438 (10th Cir. 1988) (discovery properly denied because securities dealers sanctioned by SEC "were unable to show that others similarly situated were not subjected to enforcement proceedings"). Even the Ninth Circuit had, before the decision in this case, correctly required defendants seeking discovery from the government to introduce "solid, credible" evidence that other similarly situ-

ated offenders had not been prosecuted in order to obtain discovery on a claim of selective prosecution. *United States v. Bourgeois*, 964 F.2d 935, 939 (9th Cir.), cert. denied, 113 S. Ct. 290 (1992).

The substantial threshold showing necessary to permit a court to order discovery on a selective prosecution claim does not require proof of a prima facie case of selective prosecution. The evidence need not be so forceful or comprehensive as would be required to establish a prima facie case. But a mere nonfrivolous assertion of selective prosecution is not enough to justify an order requiring discovery. If defendants were not required to come forward with more than a nonfrivolous assertion, they could too easily provoke unwarranted inquiries and needless delay. A substantial threshold showing lies between those two poles. It requires concrete evidence on both elements of a selective prosecution claim sufficient to show a reasonable likelihood that unconstitutional selective prosecution has taken place. The standard will "discourage fishing expeditions, protect legitimate prosecutorial discretion, [and] safeguard government investigative records." *Bourgeois*, 964 F.2d at 940.

Requiring defendants to make a significant threshold showing that others who are similarly situated have not been prosecuted is a particularly practical device for courts to use in determining whether or not further judicial inquiry may be warranted. The question whether similarly situated offenders have been prosecuted is readily susceptible to objective proof. At the same time, the requirement that a defendant make a significant threshold showing that others who are similarly situated have not been prosecuted "still allow[s] meritorious

claims to proceed." *Bourgeois*, 964 F.2d at 940. In those rare instances in which there are reasonable grounds to credit and explore a claim of selective prosecution, it should not be difficult for a criminal defendant to make an objective showing of disparity of treatment.

Experience in the courts of appeals demonstrates that evidence concerning similarly situated offenders is not in the government's exclusive possession. See *United States v. Adams*, 870 F.2d 1140, 1145-1146 (6th Cir. 1989) (discovery ordered where record suggested that taxpayers who underreported income and voluntarily amended returns and paid deficiencies, as defendants did, were not prosecuted); *United States v. Gordon*, 817 F.2d 1538, 1540 (1987) (discovery affirmed; colorable entitlement shown where defendants presented some evidence of similar violations by other persons who were not prosecuted, as well as evidence of invidious intent), vacated in part on rehearing on other grounds, 836 F.2d 1312 (11th Cir.), cert. dismissed, 487 U.S. 1265 (1988); *United States v. Holmes*, 794 F.2d 345, 348 & n.3 (8th Cir. 1986) (defendant submitted names of 30 white farmers not prosecuted for same conduct; court's review of prosecution records *in camera* showed adequate explanation for defendant's allegations); *United States v. Hoover*, 727 F.2d 387, 389 (5th Cir. 1984) (defendant met first part of test for selective prosecution by showing that only three of the 300 striking air traffic controllers in the Houston area were prosecuted); *United States v. Hazel*, 696 F.2d 473, 475 (6th Cir. 1983) (showing that 34 other members of Michigan tax revolt group committed same offense but were not prosecuted probably enough to demand evidentiary hearing on first prong of selective prosecution test, but defendants failed to

show evidence of intent to discriminate); *United States v. Diggs*, 613 F.2d 988, 1003-1004 (D.C. Cir. 1979) (congressman offered evidence that two other congressmen who had engaged in similar conduct were not prosecuted; court assumed that first prong of discovery standard was met, but denied discovery on the ground that there was no evidence of discriminatory intent), cert. denied, 446 U.S. 982 (1980); *United States v. Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972) (conviction reversed based on defendant's showing that six others who had also refused to complete census form were not prosecuted). A requirement that a defendant produce some evidence of similarly situated offenders to obtain discovery is therefore a fair burden to place on a defendant who seeks to inquire into the prosecutor's motives for bringing a criminal case.

Respondents did not meet that burden. In support of their claim of selective prosecution, respondents produced evidence that all of the 24 crack prosecutions closed by the Federal Public Defender in 1991 involved black defendants. Under the correct legal standard, that evidence was legally insufficient to justify a discovery order. As the original panel in this case explained, that evidence "demonstrates only that others *have* been prosecuted, not that others similarly situated have not." Pet. App. 80a. The showing therefore contains "a total lack of evidence" (*ibid.*) on an essential element of a selective prosecution claim: the disparate treatment of offenders who are similarly situated but for their race. Thus, as the

original panel concluded, the district court's discovery order was unwarranted.²

C. The Court Of Appeals' Reasons For Eliminating The Similarly Situated Offender Requirement Are Unsound

The court of appeals recognized that there was no factual showing in this case that the government had failed to prosecute similarly situated persons of a different race. The court held, however, that such evidence was unnecessary. The court of appeals gave several reasons for dispensing with the similarly situated offender requirement universally recognized by other circuits. Those reasons are unsound.

1. The court first held that evidence of similarly situated offenders is unnecessary because of a legal presumption "that people of all races commit all types of crimes." Pet. App. 19a & n.6. According to the court, a criminal defendant can rely on that presumption, unless the government introduces "compelling contrary evidence." *Id.* at 19a. The court stated that "[t]he fact that evidence of similarly situated persons who were not prosecuted was submitted in other kinds of selective prosecution claims is of no significance in the context of a selective prosecution case based on race" because, in the court's view, imposing such a requirement in relation to race-based claims "would be accepting unwarranted racial stereotypes." *Id.* at 19a n.6.

² The district court did not rely on respondents' affidavits in exercising its discretion to order discovery in this case. J.A. 217. They are therefore irrelevant here. In any event, those affidavits are also legally insufficient to support a discovery order. See note 4, *infra*.

The need to identify similarly situated persons who have not been prosecuted, however, does not diminish simply because the claim is one of race-based selective prosecution. As the panel in this case explained, "[s]elective prosecution" implies that a selection has taken place," Pet. App. 80a, and that principle is applicable to claims of selective prosecution based on race. Evidence that members of a particular racial group have been prosecuted fails to provide any basis for believing that a selection has taken place, unless there is evidence that similarly situated persons of a different race have not been prosecuted. *Ibid.* Absent concrete evidence to that effect, "the most reasonable conclusion is that the defendant was selected for prosecution because the government believed the defendant committed the offense; the fact that the defendant is a member of a protected class is coincidental." *Ibid.*

In addition, as noted above, "in the context of a criminal prosecution, the Government enjoys a presumption of having 'undertaken [the action] in good faith and in nondiscriminatory fashion.'" *Irish People, Inc.*, 684 F.2d at 947. This Court has made clear that "tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty." *Mezzanatto*, 115 S. Ct. at 806, quoting *Town of Newton*, 480 U.S. at 397. Accordingly, "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *Chemical Foundation, Inc.*, 272 U.S. at 14-15; see *McCleskey*, 481 U.S. at 297. Reliance on a presumption, rather than actual proof, to permit the defendant to make a threshold showing of a discriminatory effect runs counter to that settled rule. To overcome that presumption of prosecutorial

good faith, the defendant must adduce facts, not assumptions.

Nor does insisting on evidence that other similarly situated offenders of another racial group have not been prosecuted accept racial stereotypes. Rather, it recognizes the empirical possibility that, for socioeconomic and historical reasons, members of particular racial and ethnic groups may predominate in the commission of certain crimes. The government in fact presented affirmative evidence in this case supporting the conclusion that black individuals dominate large-scale dealing in crack, while members of other racial groups dominate the sales of other drugs. See Pet. App. 22a; see *id.* at 72a-73a (panel opinion). Information from the Sentencing Commission confirms that particular crimes can be associated with particular racial groups. According to the Commission's most recent nationwide statistics, more than 90% of those persons sentenced for trafficking in crack cocaine were black. United States Sentencing Comm'n, *Annual Report 1994*, at 107 (Table 45). In contrast, 93.4% of those sentenced for trafficking in LSD, 100% of those sentenced for antitrust violations, and 91.4% of those sentenced for pornography and prostitution offenses were white. *Id.* at 41, 107 (Tables 13, 45). In addition, of those sentenced for trafficking in methamphetamine, 72.9% were white, while only 1.6% were black. *Id.* at 107 (Table 45). The court of appeals, in the interest of avoiding what it characterized as racial stereotypes, was not free to adopt an evidentiary presumption that has neither a rational nor a factual foundation. Cf. *Basic Inc. v. Levinson*, 485 U.S. 224, 245-246 (1988); *Turner v. United States*, 396 U.S. 398, 404-405 (1970).

2. In dispensing with the similarly situated offender requirement, the court of appeals also relied on cases indicating that statistical disparities alone can constitute sufficient evidence of discriminatory effect and intent to establish a *prima facie* case of selective prosecution. The court stated that the standard for obtaining discovery is lower than that for establishing a *prima facie* case. It then reasoned that because a showing of a statistical disparity in the race of those persons prosecuted would establish a *prima facie* case, it is also sufficient to warrant discovery. Pet. App. 10a-11a. But the court's application of its analysis reveals its misunderstanding of the concept of a "disparity." The court held that respondents' evidence that all 24 crack prosecutions closed by the Federal Public Defender in 1991 involved black defendants established a statistical disparity, and that respondents were therefore relieved of the necessity of showing that others who are similarly situated have not been prosecuted. *Id.* at 15a-16a; see *id.* at 10a n.1 (evidence of similarly situated offenders is not required when there is statistical evidence of a disparity in the race of those prosecuted).

The court's chain of reasoning is seriously flawed. This Court has held that, in some circumstances, statistical disparities can establish a *prima facie* case of discriminatory effect and intent. *McCleskey*, 481 U.S. at 293-294 & nn.12, 13 (discussing cases); *Village of Arlington Heights*, 429 U.S. at 266; *Yick Wo*, 118 U.S. at 373-374. Under this Court's decisions, however, a disparity does not exist just because the persons prosecuted are predominantly of one race. Rather, a disparity exists when there is a substantial difference between the racial composition of the group prosecuted and the racial composition of the group

eligible for prosecution. See *Hazelwood School District v. United States*, 433 U.S. 299, 307-308 & n.13 (1977); *Yick Wo*, 118 U.S. at 373-374. Demonstrating such a disparity necessarily entails proof that others who are similarly situated have not been prosecuted. Absent such a showing, the evidence fails to cast any doubt on the most obvious race-neutral explanation for the prosecutions brought: that the pool of persons prosecuted mirrors the pool of persons eligible for prosecution.³

Yick Wo and the Court's subsequent decision in *Ah Sin v. Wittman*, 198 U.S. 500 (1905), demonstrate that statistical evidence is capable of showing discriminatory effect and intent only when it involves proof that similarly situated persons have not been prosecuted. In *Yick Wo*, an ordinance prohibited the operation of laundries constructed of wood except by persons who obtained permission from the Board of Supervisors. The evidence showed that 200 laundry owners of Chinese ancestry petitioned the Board for permission to continue their businesses in wooden buildings, and every one of those petitions was denied. 118 U.S. at 359 (Statement of Facts). In contrast, of the petitions

³ In addition, where, as here, "the discretion that is fundamental to our criminal process is involved," *McCleskey*, 481 U.S. at 313, statistical evidence would be capable of proving a violation of the Equal Protection Clause only if the disparity between the racial composition of those selected and the racial composition of those eligible for selection is so "stark" as to be "unexplainable" on any ground other than race. *Id.* at 293-294 & n.12; *Village of Arlington Heights*, 429 U.S. at 266; *Yick Wo*, 118 U.S. at 373. Because there was no showing of any disparity in this case, the question of how extreme such a disparity must be to prove unconstitutional selective prosecution is not at issue here.

filed by the 80 laundry owners of non-Chinese ancestry, all but one was granted. *Ibid.* As a result, 150 laundry owners of Chinese ancestry were arrested for violating the ordinance, while no laundry owners of non-Chinese ancestry were arrested. *Ibid.* The Court held that those facts established a violation of the Equal Protection Clause. *Id.* at 373-374. The Court explained that the Board had engaged in disparate treatment of persons of Chinese ancestry and non-Chinese ancestry who were in "similar circumstances" and that no reason for the disparate treatment was possible except for "hostility" to persons of Chinese ancestry. *Id.* at 374. The finding of a violation in *Yick Wo* therefore depended on evidence that similarly situated persons had not been prosecuted.

In *Ah Sin*, an ordinance prohibited the display of gambling implements in a barred or barricaded room. The defendant alleged that the ordinance was enforced only against persons of Chinese ancestry. Because the defendant failed to allege that there were persons of non-Chinese ancestry who had violated the ordinance, however, the Court held that the defendant had failed to allege the facts necessary to establish a violation of the equal protection principle established in *Yick Wo*. The Court reasoned that

[i]n the *Yick Wo* case there was not a mere allegation that the ordinance attacked was enforced against the Chinese only, but it was shown that not only the petitioner in that case, but two hundred of his countrymen, applied for licenses, and were refused, and that all the petitions of those not Chinese, with one exception, were granted. The averment in the case at bar is that

the ordinance is enforced "solely and exclusively against persons of the Chinese race and not otherwise." There is no averment that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that there were other offenders against the ordinance than the Chinese as to whom it was not enforced.

198 U.S. at 507-508.

Respondents' statistical evidence contains the same flaw identified in *Ah Sin*: the absence of any evidence that similarly situated persons of a different race were not prosecuted. The court of appeals' view that statistical evidence need not include such information in order to prove a violation of the Equal Protection Clause is incorrect. See *United States v. Cooks*, 52 F.3d at 105 (statistics reflecting that the overwhelming majority of those arrested for possession of crack are African-American failed to satisfy first prong of selective prosecution inquiry because it did not establish that white defendants committing this offense were prosecuted in state rather than federal court); *United States v. Gutierrez*, 990 F.2d 472, 476 (1993) (statistics showing a high percentage of certain groups being prosecuted insufficient to establish that similarly situated persons are not being prosecuted), overruled by *United States v. Armstrong*, 48 F.3d 1508, 1513 n.1 (9th Cir. 1995) (en banc); *United States v. Huff*, 959 F.2d 731, 735 (8th Cir.) (evidence from newspaper article stating that 87% of arrests in reverse sting cases in Minneapolis were African-Americans insufficient to establish prima facie case of selective prosecution because there was no evidence that similarly situated

non-African-Americans were not being prosecuted for similar conduct), cert. denied, 113 S. Ct. 162 (1992).

3. The court of appeals' elimination of the similarly situated offender requirement also appears to have been animated by its concern that defendants who have potentially meritorious claims may be unable to prove their cases without obtaining discovery from the government. Pet. App. 11a-12a. Courts have long required defendants to offer at least some evidence on both prongs of the selective prosecution defense before ordering discovery, however, and there is no basis for assuming that defendants with valid claims cannot meet those standards. As previously discussed, evidence concerning similarly situated offenders is not in the government's exclusive possession. See pages 26-27, *supra*.

The present case is illustrative. If there were any substance to respondents' claim that the United States Attorney improperly selects only blacks in prosecutions for dealing in crack, respondents should have had no difficulty producing concrete evidence that similarly situated persons of other races were being prosecuted by the State of California. Although information concerning persons prosecuted by the State is readily accessible to the public, respondents failed to produce such evidence.⁴

⁴ The affidavits submitted by respondents concerning non-black crack dealers contain only vague, conclusory, and impressionistic hearsay. They do not provide the kind of solid and credible evidence necessary to support a discovery order. Cf. *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 724-725 (1990). Those affidavits also fail to include any information that would suggest that crack dealers prosecuted in the state courts were similarly situated to respondents. Respondents were indicted for conspiring to distribute more than 50 grams

4. Finally, the court of appeals relied on the principle that a district court's discovery orders must be reviewed under an abuse of discretion standard. Pet. App. 7a; *id.* at 29a-31a (Wallace, J., concurring). A district court must exercise its discretion, however, on the basis of correct legal principles. As this Court has stated, "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975), quoting *United States v. Burr*, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,692d) (Marshall, C.J.). When a district court exercises its discretion on the basis of an erroneous view of the law, it necessarily abuses its discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402, 405 (1990). That is the situation here. As we have discussed, the district court's order is premised on the incorrect understanding that discovery may be ordered based solely on evidence that persons of a particular race have been prosecuted for a particular offense, without evidence that similarly situated persons of a different race have not been prosecuted for that offense. In view of that legal

of cocaine and that conspiracy involved the use of firearms. The affidavits do not assert that there are any non-black crack dealers prosecuted in state court who have trafficked in comparable quantities of crack and who have used firearms in connection with that trafficking. For those reasons, the panel correctly concluded that the affidavits did not assist respondents in making the threshold showing necessary to obtain discovery. Pet. App. 82a-83a (describing the affidavits as containing unsubstantiated hearsay, noting that they do not include any information on the quantity of drugs involved or the presence of firearms, and concluding that they constitute "flimsy" and "ineffective" evidence).

error, the district court abused its discretion in ordering discovery in this case.

The court's error is particularly evident on the facts of this case. Respondents introduced evidence concerning an extremely small, unrepresentative sample of defendants who were prosecuted. That evidence proves little, if anything, about the actual pool of persons prosecuted, and nothing about the pool of persons eligible for prosecution. In contrast, the government offered specific information on the reasons it brought the charges in this case: the decision to prosecute was based on the large quantity of drugs involved, the number of sales and defendants, the presence of firearms violations intertwined with the drug offenses, the involvement of a federal agency in the investigation, the criminal histories of the defendants, and the strength of the evidence. J.A. 81. As the panel concluded, if discovery can be ordered on that kind of record, "district courts too often and unnecessarily could become immersed in the workings of a coordinate branch of government, to the benefit of neither." Pet. App. 84a. Under the controlling legal standards, the order of discovery in this case was an abuse of discretion.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 1995

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Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRISTOPHER LEE ARMSTRONG, et al.,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

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QUESTIONS PRESENTED

1. What is the legal standard that must be met in order for a defendant in a criminal prosecution to be entitled to discovery on a selective prosecution claim.

2. Whether a defendant in making a discovery motion on a selective prosecution claim must in every case present evidence that the government has failed to prosecute others who are similarly situated, or is it sufficient if the defendant's discovery motion raises only a reasonable inference that the government has failed to prosecute others who are similarly situated.

TABLE OF CONTENTS

	Page
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATEMENT OF THE FACTS.....	1
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A DISCOVERY MOTION ON A SELECTIVE PROSECUTION CLAIM BECAUSE A PARTY SEEKING SUCH DISCOVERY IS ONLY REQUIRED TO SHOW A COLORABLE BASIS FOR HIS CLAIM OF SELECTIVE PROSECUTION AND IS NOT REQUIRED TO SHOW A PRIMA FACIE CASE OF SELECTIVE PROSECUTION.....	7
A. The Colorable Basis Test Provides The Appropriate Balance Between The Right Of The Government To Vigorously Enforce The Criminal Laws And The Right Of The Accused To Be Free Of Unconstitutional Selective Prosecution.....	8
B. The Colorable Basis Test Is Met When A Defendant Has Presented Evidence Which Raises A Reasonable Inference That The Charges In His Case Are A Result Of Unconstitutional Selective Prosecution.....	17
C. District Courts Are Vested With Wide Discretion In Ruling On Discovery Issues And There Was No Abuse Of Discretion By The Court's Order Granting The Discovery Motion In This Case	24
CONCLUSION	37

TABLE OF AUTHORITIES

	Page
CASES	
Ah Sin v. Wittman, 198 U.S. 500 (1905)	5, 14
Alderman v. United States, 394 U.S. 265 (1969).....	37
Alexander v. Louisiana, 405 U.S. 625 (1972)	27
Amadeo v. Zant, 486 U.S. 212 (1988).....	26
Anderson v. Bessemer City, 470 U.S. 564 (1985)	7, 25, 26, 30
Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	6, 22, 23
Attorney General of the United States v. Irish People, Inc., 684 F.2d 928 (D.C. Cir. 1982).....	12, 14
Ballard v. Superior Court, 64 Cal. 3d 159, 49 Cal. Rptr. 302, 410 P.2d 838 (1966).....	24
Batson v. Kentucky, 476 U.S. 79 (1986)	6, 10, 20, 22
Bazemore v. Friday, 478 U.S. 385 (1986)	22
Bolling v. Sharpe, 347 U.S. 497 (1954)	17
Brown v. Board of Education, 347 U.S. 483 (1954)	31
Burns v. United States, 287 U.S. 216 (1932).....	25
Castaneda v. Partida, 430 U.S. 498 (1976)....	21, 22, 23, 27
Dennis v. United States, 384 U.S. 855 (1966).....	24
Gomillion v. Lightfoot, 364 U.S. 339 (1960).....	23
Griffin v. Municipal Court, 20 Cal. 3d 300, 142 Cal. Rptr. 286, 571 P.2d 997 (1977).....	24
Hernandez v. Texas, 347 U.S. 475 (1954).....	22, 27, 31

TABLE OF AUTHORITIES - Continued

	Page
Hirabayashi v. United States, 320 U.S. 81 (1943).....	18
In re Grand Jury, 619 F.2d 1022 (3d Cir. 1988).....	12
Jencks v. United States, 353 U.S. 657 (1957)	37
Loving v. Virginia, 388 U.S. 1 (1967)	18, 32
McCleskey v. Kemp, 481 U.S. 279 (1987)	21
Murgia v. Municipal Court, 15 Cal. 3d 286, 124 Cal. Rptr. 204, 540 P.2d 44 (1975)	24
Oyler v. Boles, 368 U.S. 448 (1962)	19
Pullman-Standard v. Swint, 456 U.S. 273 (1982).....	25
Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978)	32
Rose v. Mitchell, 443 U.S. 545 (1974)	18
St. Germain of Alaska Easter Orthodox Catholic Church v. United States, 840 F.2d 1087 (2d Cir. 1988)	12
Strauder v. West Virginia, 100 U.S. 303 (1880)	31, 32
Swain v. Alabama, 380 U.S. 202 (1965)	10
Turner v. Fouche, 396 U.S. 346 (1970)	22
United States v. Adams, 870 F.2d 1140 (6th Cir. 1989)	12, 13
United States v. Armstrong, 21 F.3d 1431 (9th Cir. 1994)	4, 16
United States v. Armstrong, 48 F.3d 1501 (9th Cir. 1995)	4, 11, 12, 15
United States v. Berrigan, 482 F.2d 171 (3rd Cir. 1973)	11

TABLE OF AUTHORITIES - Continued

	Page
United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974)	11, 12, 19
United States v. Bourgeois, 964 F.2d 935 (9th Cir. 1992)	12, 30
United States v. Cammisano, 546 F.2d 238 (8th Cir. 1976)	11
United States v. Clary, 34 F.3d 709 (8th Cir. 1994)...	32, 33
United States v. Clary, 846 F. Supp. 768 (E.D. Mo. 1994)	32
United States v. Dumas, 64 F.3d 1427 (9th Cir. 1995)	33
United States v. Gordon, 817 F.2d 1538 (11th Cir. 1988)	12, 14
United States v. Greenwood, 796 F.2d 49 (4th Cir. 1986)	12
United States v. Heidecke, 900 F.2d 1155 (7th Cir. 1990)	11, 12
United States v. Johnson, 577 F.2d 1304 (5th Cir. 1978)	12
United States v. Marshall, 56 F.2d 1210 (9th Cir. 1995)	30
United States v. Murdock, 548 F.2d 599 (5th Cir. 1977)	11
United States v. Nixon, 418 U.S. 683 (1974)	7, 13, 24, 25
United States v. P.H.E., Inc., 965 F.2d 848 (10th Cir. 1992)	12
United States v. Parham, 16 F.3d 844 (8th Cir. 1994)	12

TABLE OF AUTHORITIES – Continued

	Page
United States v. Penagarican-Soler, 911 F.2d 833 (1st Cir. 1990)	12
United States v. Redondo-Lemos, 27 F.3d 439 (9th Cir. 1994)	20
United States v. Redondo-Lemos, 955 F.2d 1296 (9th Cir. 1992)	19
United States v. Turner, 901 F. Supp. 1491 (C.D. Cal. 1995)	29, 33
United States v. United States Gypsum Co., 333 U.S. 364 (1948)	25
United States v. Yellow Cab Co., 338 U.S. 338 (1949)	26
Vasquez v. Hillery, 474 U.S. 254 (1986)	32
Wade v. United States, 504 U.S. 181 (1992)	5, 10
Wardius v. Oregon, 412 U.S. 470 (1973)	24
Washington v. Davis, 426 U.S. 229 (1976)	6, 18, 22
Wayte v. United States, 470 U.S. 598 (1985)	<i>passim</i>
Whitus v. Georgia, 385 U.S. 545 (1967)	21
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	17, 23
CONSTITUTION, STATUTES AND RULES:	
U.S. Const.:	
Amend. V	17
Amend. XIV	17, 18
18 U.S.C. § 924(c)	2
21 U.S.C. § 841	2, 3

TABLE OF AUTHORITIES – Continued

	Page
21 U.S.C. § 841(b)	2, 26, 34
21 U.S.C. § 846	1, 2, 3
21 U.S.C. § 960(b)	34
Cal. Health & Saf. Code § 11351.5	2, 26
Cal. Health & Saf. Code § 11370	26
Cal. Health & Saf. Code § 11370.2	26
MISCELLANEOUS:	
Amendment 5, in U.S. Sentencing Commission, "Amendments to the Sentencing Guidelines" (May 1, 1995)	35
Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash. U.L.Q. 279	24
Developments – Race and the Criminal Process, 101 Harv. L. Rev. 1520 (1988)	18
"Harsher Crack Sentences Criticized as Racial Inequality" Los Angeles Times (Nov. 23, 1992)	36
H.R. No. 104-272 reported in U.S. Code Congressional & Administrative News, 104th Congress, 1st Sess., pp. 335, 352 (Dec. 1995)	29, 35
U.S. Sentencing Commission: Materials Concerning Sentencing For Crack Cocaine Offenses, 57 Criminal Law Reporter 2127, 2131 (May 31, 1995)	33, 34
United States Sentencing Guidelines § 2D1.1	34

OPINIONS BELOW

The opinion of the en banc court of appeals is reported at 48 F.3d 1508. The panel opinion of the court of appeals is reported at 21 F.3d 1431.

JURISDICTION

The judgment of the en banc court of appeals was entered on March 2, 1995. By order dated June 21, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including July 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE FACTS

In April of 1992, respondents Christopher Armstrong, Aaron Hampton, Freddie Mack, Shelton Martin, and Robert Rozelle were charged with federal offenses for their alleged involvement in the distribution of cocaine base, known colloquially as "crack" or "rock". The charges stemmed from an investigation conducted under the direction of a joint state and federal task force comprised of detectives from the Inglewood Police Department and agents from the Bureau of Alcohol, Tobacco, and Firearms. (Pet. App. 4a)

All five respondents were charged with conspiracy to distribute cocaine base under 21 U.S.C. § 846. Some of the respondents were also charged with selling cocaine base

under 21 U.S.C. § 841(a)(1) and using firearms in connection with drug trafficking in violation of 18 U.S.C. § 924(c). The decision to charge the respondents with federal rather than California state offenses was significant. Federal law imposes a minimum sentence of 10 years and a maximum of life for those convicted of selling more than 50 grams of cocaine base. 21 U.S.C. § 841(b). By contrast, under California law, the minimum sentence for that offense is three years and the maximum is five. Cal. Health & Safety Code § 11351.5. All five respondents are Black. (Pet. App. 4a)

Respondents filed a motion for discovery on a claim of selective prosecution, arguing that the decision to prosecute on federal charges rather than state charges was based on race. To support the motion for discovery, the respondents offered into evidence a study of every case involving a charge under 21 U.S.C. §§ 841 and 846 that the Federal Public Defender's Office for the Central District of California had closed in 1991. The study showed that in all 24 such cases the defendants had been Black. (J.A. 68-70)

The district court granted the motion for discovery. Specifically, the district judge ordered the government to: (1) provide a list of all cases from the prior three years in which the government charged both cocaine base offenses and firearms offenses; (2) identify the race of the defendants in those cases; (3) identify whether state, federal, or joint law enforcement authorities investigated each case; and (4) explain the criteria used by the U.S. Attorney's Office for deciding whether to bring cocaine base cases to the federal court. (Pet. App. 4a-5a)

The government chose not to comply with the discovery order and instead filed a motion for reconsideration. In support of its motion, the government provided a list of all defendants charged with violation of 21 U.S.C. §§ 841 and 846 over a three year period without any racial breakdown and declarations by three law enforcement officers and two Assistant United States Attorneys. The declarations asserted that socioeconomic factors led certain ethnic and racial groups to be particularly involved with the distribution of certain drugs and that Blacks were particularly involved in the Los Angeles area crack trade. The declarations also contained a description of some of the race neutral factors on which federal prosecutors based their charging decisions for crack related offenses. The factors specifically referred to were the strength of the evidence, the deterrent value of bringing the charge, the federal interest in the prosecution, and the suspect's criminal history. (J.A. 71-83)

In opposition to the motion for reconsideration, the respondents submitted additional declarations of their counsel. First, one of the respondents' counsel stated that she had spoken with a halfway house intake coordinator who told her that in his experience in treating cocaine base addicts, Whites and Blacks dealt and used the drug in equal numbers. Second, another attorney asserted that his experience and conversations with judges, lawyers, and defendants led him to conclude that many non-Blacks were prosecuted for cocaine base offenses in state court. Finally, the respondents submitted an article from the *Los Angeles Times* which reported that 92.6% of all drug offenders sentenced to federal prison for cocaine

base offenses from April 1, 1992 to July 31, 1992 were Black. (J.A. 138-142; 209-210)

District Judge Consuelo Marshall denied the motion for reconsideration. She stated her reasons for the denial at the hearing: "The statistical data provided by the Defendant raises a question about the motivation of the government which could be satisfied by the government disclosing its criteria, if there is any criteria, for bringing this case and others like it in Federal court. Without this criteria the statistical data is evidence and does suggest that the decisions to prosecute in Federal court could be motivated by race. Without expert testimony, this Court cannot conclude that the defendants' evidence is explained by social phenomena." (J.A. 217)

The government again chose not to comply with the discovery order. (J.A. 223-224) The respondents moved to dismiss the indictment as a sanction. The district judge dismissed the indictments, but stayed the order pending appeal. (J.A. 226; 231) The government timely appealed.

The original three judge panel reversed, finding that the respondents' study did not establish a colorable basis for ordering discovery because it did not show that others similarly situated were not prosecuted. *United States v. Armstrong*, 21 F.3d 1431 (9th Cir. 1994). A rehearing was granted and an en banc court affirmed the discovery order and dismissal, finding that the respondents' study did establish a colorable basis for believing that similarly situated members of other races were not prosecuted and that there was no abuse of discretion. *United States v. Armstrong*, 48 F.3d 1508 (9th Cir. 1995).

SUMMARY OF THE ARGUMENT

A claim of selective prosecution is to be judged according to ordinary equal protection standards and will require proof that an enforcement system "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. United States*, 470 U.S. 598, 608 (1985). The legal test for obtaining discovery on a selective prosecution claim is the "colorable basis" test. A defendant must show a colorable basis for his selective prosecution claim before he can obtain such discovery. The term "colorable basis" has been defined as "some evidence tending to show the existence of the essential elements of the defense." *Wayte v. United States*, *supra* at 624. (Marshall, J., dissenting)

The government's argument that the legal test for discovery requires a "substantial threshold showing" is based upon dicta in a case where the defendant made no showing of unconstitutional discrimination. Defense counsel in that case unnecessarily conceded that the standard for discovery was a substantial threshold showing. *Wade v. United States*, 504 U.S. 181, 186 (1992).

The government's argument that the showing to obtain discovery must include some evidence that similarly situated persons have not been prosecuted, is based primarily upon language in a case which decided the merits of a selective prosecution claim. *Ah Sin v. Wittman*, 198 U.S. 500, 507 (1905). Indeed, the government has conceded that the "showing necessary to permit a court to order discovery on a selective prosecution claim does not require proof of a prima facie case of selective prosecution." (Gov't. Brief p. 25)

Respondent would urge the Court to rule that a defendant has established a colorable basis when the defendant's showing on a discovery motion raises a "reasonable inference" that he may be a victim of selective prosecution. The reasonable inference approach is similar to the approach taken in cases where a defendant claims that a prosecutor's repeated use of peremptory challenges to exclude Blacks from a jury was unconstitutionally motivated by race. *Batson v. Kentucky*, 476 U.S. 79, 93-97 (1986). "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). See also, *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

In respondents' case, the showing made for discovery was a statistical study prepared by the Federal Public Defender's office. The study showed that in the 24 cases involving cocaine base charges closed by that office in 1991, all of the defendants were Black. The respondents also presented declarations from their defense counsel stating that there are cocaine base offenders who are White, who have been prosecuted in state court. The essence of the selective prosecution claim in this case was that Black cocaine base offenders were being unconstitutionally selected for prosecution in federal court where the penalties are higher, rather than in state court where the penalties are lower. The district court made a factual finding that the discovery motion had established a colorable basis and granted the motion.

Since district courts have wide discretion in ruling on discovery matters, the standard of review on appeal is the abuse of discretion standard. *United States v. Nixon*, 418 U.S. 683, 702 (1974). Under the clearly erroneous standard of review, a reviewing court may not reverse a factual finding of the district court simply because it is convinced that it would have decided the case differently. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). The finding by the district court in this case that respondents' discovery motion established a colorable basis for a selective prosecution claim, is a factual finding that is entitled to deferential review. Under the facts of this case, the district court did not abuse its discretion.

ARGUMENT

I.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A DISCOVERY MOTION ON A SELECTIVE PROSECUTION CLAIM BECAUSE A PARTY SEEKING SUCH DISCOVERY IS ONLY REQUIRED TO SHOW A COLORABLE BASIS FOR HIS CLAIM OF SELECTIVE PROSECUTION AND IS NOT REQUIRED TO SHOW A PRIMA FACIE CASE OF SELECTIVE PROSECUTION.

The decisions of both the district court and the en banc court of appeals in this case should be affirmed. The district court granted the respondents' motion for discovery on a selective prosecution claim. When the government, standing on principle, refused to comply with the discovery order, the district court dismissed the indictment. The court of appeals held that the district court had

the discretion to order discovery on a selective prosecution claim on the record in this case. It affirmed the order and the dismissal of the indictment. The court of appeals ruled that a discovery motion on a selective prosecution claim may be ordered if a defendant presents evidence establishing a "colorable basis" that he is a victim of selective prosecution.

Both the court of appeals and the district court were aware of the elements of the law of selective prosecution. The government on this appeal contends that the lower courts did not know when it was appropriate to order discovery on a claim of selective prosecution. Thus, the issue in this case does not concern the elements of selective prosecution. The issue is what is the legal standard to be met for a defendant in a criminal case to be entitled to discovery on a selective prosecution claim. Is that legal standard the "colorable basis" test? If so, what is the correct legal definition of the term "colorable basis?" Finally, did the district court abuse its discretion in ordering discovery in this case?

A. The Colorable Basis Test Provides The Appropriate Balance Between The Right Of The Government To Vigorously Enforce The Criminal Laws And The Right Of The Accused To Be Free Of Unconstitutional Selective Prosecution.

The government first argues that a prosecutor has broad discretion to enforce the criminal laws and that a defendant seeking discovery on a claim of selective prosecution must make a substantial threshold showing on

each element of the claim. (Gov't. Brief p. 20) The government relies upon several policy considerations in support of their argument: the decision to prosecute is ill-suited to judicial review; judicial supervision entails systemic costs, such as delays in the proceedings; judicial supervision chills law enforcement efforts and undermines prosecutorial effectiveness. *Wayte v. United States*, 470 U.S. 598, 607 (1985). Although all of these policy considerations are valid, it does not follow that they require a substantial threshold showing before discovery may be granted.

The legal issues concerning discovery related to a selective prosecution claim have never been directly before this Court before. The issue concerning the required showing needed to obtain such discovery is an issue of first impression. Indeed, it has been over ten years since the Court had before it a case involving a selective prosecution claim. In that case, *Wayte v. United States*, 470 U.S. 598 (1985), the Court was faced with a district court order dismissing an indictment on the grounds that the defendant had established a prima facie case of selective prosecution in a criminal prosecution for failure to register for the draft. The defendant argued that he had been singled out for prosecution because he was an outspoken opponent of the draft and that his prosecution was undertaken on the impermissible ground of punishing him for exercising his First Amendment right of free speech. Ultimately, this Court reversed the dismissal order, finding that even if the record established that the government's action had a discriminatory effect, the record did not show that the government intended

this effect or had prosecuted the defendant because of his protests. *Wayte v. United States*, *supra* at 608-610.

In a footnote, the Court in *Wayte* expressly stated that it was not deciding "whether Wayte has earned the right to discover Government documents relevant to his claim of selective prosecution" because he had not raised the issue in his petition for certiorari, his brief on the merits, or at oral argument. *Wayte v. United States*, *supra* at 605 n.5. Furthermore, this Court's decision in *Wade v. United States*, 504 U.S. 181 (1992), relied upon by the government for its "substantial threshold showing" language, did not resolve the controversy raised in this case.

In *Wade v. United States*, *supra*, this Court held that a district court may subject the government's refusal to file a substantial-assistance motion to review for constitutional violations, if for example, the prosecutor refused to file such a motion because of the defendant's race or religion. On the issue of discovery, the defendant in *Wade* conceded that to obtain discovery he had to make a substantial threshold showing. *Ibid* at 186. Furthermore, the record showed that the defendant had no evidence at all upon which to make any showing. Thus, the language in *Wade* is dicta and the Court should not premise important legal decisions on a concession of a party to a case.¹

¹ Indeed, in *Batson v. Kentucky*, 476 U.S. 79, 112-115 (1986) the Court ignored a concession made by petitioner's counsel that he was not making an equal protection argument and that he was not asking for the Court to overrule *Swain v. Alabama*, 380 U.S. 202 (1965). The Court's ultimate decision in *Batson* overruled *Swain* and held that petitioner's right to equal protection had been violated. *Batson v. Kentucky*, *supra* at 97, 100.

At the time of this Court's *Wayte* decision, the general consensus in the court of appeals was that the legal test for obtaining discovery on a selective prosecution claim was the "colorable basis" test. *Wayte v. United States*, 470 U.S. 598, 623-24 (1985) (Marshall, J., dissenting). As Justice Marshall noted in his dissenting opinion "[A] defendant establishes his right to discovery if he can show a 'colorable basis' for a selective prosecution claim." *Wayte v. United States*, *supra* at 623, citing *United States v. Murdock*, 548 F.2d 599, 600 (5th Cir. 1977); *United States v. Cammisano*, 546 F.2d 238, 241 (8th Cir. 1976); *United States v. Berrios*, 501 F.2d 1207, 1211 (2nd Cir. 1974); *United States v. Berrigan*, 482 F.2d 171, 181 (3rd Cir. 1973). The term "colorable basis" was defined as "some evidence tending to show the existence of the essential elements of the defense." *Wayte v. United States*, *supra* at 624, citing *United States v. Berrios*, *supra* at 1211.

The court of appeals in respondents' case stated that "Discovery may be ordered when the evidence provides a colorable basis for believing that discriminatory prosecutorial selections have occurred." *United States v. Armstrong*, 48 F.3d 1501, 1512 (9th Cir. 1995). "The colorable basis standard is met by 'some evidence tending to show the essential elements of the claim.'" *United States v. Heidecke*, 900 F.2d 1155, 1159 (7th Cir. 1990)." *United States v. Armstrong*, *supra* at 1512. In further defining the term "some evidence" the court of appeals stated that "to obtain discovery on a selective prosecution claim, a defendant must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of government actors." *United*

States v. Armstrong, *supra* at pp. 1512-1513, citing *United States v. Bourgeois*, 964 F.2d 935, 939 (9th Cir. 1992). The majority of the Circuits are in accord with this view.²

In the leading case of *United States v. Berrios*, 510 F.2d 1207 (2d Cir. 1974), a defendant charged with holding a union office within five years after conviction for a felony made a selective prosecution claim. The defendant claimed that he was chosen for prosecution because he was a Teamster official who was an outspoken supporter of Senator McGovern for President opposing President Nixon, and because he had spearheaded an effort to unionize a restaurant chain that enjoyed close ties with President Nixon and his family. The defendant's attorney filed an affidavit alleging his belief that there were hundreds of unions with officers who have prison records. On this showing, the district court ordered discovery of

² The majority of the Circuits, the Third, Sixth, Seventh, Ninth, Tenth and District of Columbia have adopted the "colorable basis" test. *In re Grand Jury*, 619 F.2d 1022, 1030 (3d Cir. 1980); *United States v. Adams*, 870 F.2d 1140, 1146 (6th Cir. 1989); *United States v. Heidecke*, 900 F.2d 1155, 1159 (7th Cir. 1990); *United States v. Armstrong*, 48 F.3d 1508, 1512 (9th Cir. 1995); *United States v. P.H.E., Inc.*, 965 F.2d 848, 860 (10th Cir. 1992); *Attorney General of United States v. Irish People, Inc.*, 684 F.2d 928, 948 (D.C. Cir. 1982). Four Circuits, the First, Second, Fifth, and Eighth, apply a stricter "prima facie" showing test. *United States v. Penagarican-Soler*, 911 F.2d 833, 838 (1st Cir. 1990); *St. Germain of Alaska Easter Orthodox Catholic Church v. United States*, 840 F.2d 1087, 1095 (2d Cir. 1988); *United States v. Johnson*, 577 F.2d 1304, 1308 (5th Cir. 1978); *United States v. Parham*, 16 F.3d 844, 847 (8th Cir. 1994). Two Circuits, the Fourth and Eleventh, have adopted the "non-frivolous" standard. *United States v. Greenwood*, 796 F.2d 49, 52 (4th Cir. 1986); *United States v. Gordon*, 817 F.2d 1538, 1540 (11th Cir. 1988).

the letter from the prosecutor to his superiors which originally sought authorization for the prosecution of Berrios. When the government refused to comply with the order, the indictment was dismissed.

On appeal, the Second Circuit held that discovery on a selective prosecution claim may be ordered if the defendant can establish a "colorable basis" for his claim. A colorable basis was defined as "some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." *United States v. Berrios*, *supra* at 1211-1212. The court of appeals noted that Berrios had not presented any evidence of other persons similarly situated who have not been prosecuted. *Ibid.* at 1212. The court also noted that the appellate judges doubted whether they would have ordered discovery on Berrios's meager showing. *Ibid.* at 1211. Nevertheless, the court of appeals found no abuse of discretion in the district court's order for the government to turn over to the court the memorandum recommending prosecution. *Ibid.* at 1212, citing *United States v. Nixon*, 418 U.S. 683 (1974).³

³ Similar results were reached in two other court of appeals cases. In *United States v. Adams*, 870 F.2d 1140 (6th Cir. 1989), the defendant was charged with tax fraud and perjury based on testimony she had given in an earlier sex discrimination suit against the Equal Employment Opportunity Commission. She made a discovery motion on the issue of selective prosecution. She presented evidence that there had never been perjury indictments in the past in the District arising out of testimony in a civil case and that in the preceding five years in the District there had been no indictments for tax evasion where the taxes were not still due at the time of indictment. Finally, she presented an affidavit from a former director of the E.E.O.C. stating

The government argues that the showing to obtain discovery must include some evidence that similarly situated persons have not been prosecuted. (Gov't. Brief pp. 21-27) According to the government, selective prosecution requires a showing that there has been a selection. "Discrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances. Where defendant cannot show anyone in a similar situation who has not been prosecuted, . . . he has not 'met even the threshold of the *Yick Wo* doctrine - official discrimination . . . between persons in similar circumstances, material to their rights.' " *Attorney General of the United States v. Irish People, Inc.*, 684 F.2d 928, 946 (D.C. Cir. 1982).

In *Ah Sin v. Wittman*, 198 U.S. 500 (1905), the defendants were convicted of violating an ordinance forbidding presence in a locked room containing exposed gambling tables. Ah Sin sought a writ of habeas corpus on the grounds that the ordinance was enforced solely against Chinese. This Court, however, affirmed the denial

that in his opinion the criminal action was brought against the defendant in retaliation for her earlier sex discrimination suit. The court of appeal held that the colorable basis test had been met and that the district court erred in denying the discovery motion. The court stated: " 'Some evidence' of vindictive prosecution has been presented here. It is hard to see, indeed, how the defendants could have gone much farther than they did without the benefit of discovery on the process through which this prosecution was initiated." *Id.* at 1146. In *United States v. Gordon*, 817 F.2d 1538 (11th Cir. 1987), the defendant presented evidence that the government was targeting Black political leaders for voter fraud. The court ordered discovery, finding that the defendant met the colorable basis test. *Id.* at 1540.

of the writ finding that petitioner's allegation was insufficient for failure to allege and prove "that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese" and that there were non-Chinese offenders against whom the ordinance was not enforced. *Ibid.* at 507.

Applying these cases, the government argues that before a discovery motion for selective prosecution may be granted, the moving party must present specific instances or cases where other persons similarly situated have not been prosecuted. The government argues that the respondents' study by the Federal Public Defender's office in Los Angeles, that showed that each defendant in the 24 cocaine base cases closed by that office in 1991 had been Black, was an insufficient showing. In essence the government is arguing that in order to obtain discovery on a selective prosecution claim, respondents were required to show at least one case where a White defendant committed a cocaine base criminal offense and was not prosecuted for that offense in federal court, where the penalties for those offenses are higher than in state court.

However, if the respondents had evidence of such a case, there would be no need to bring a discovery motion. Respondents could simply proceed to the second step and file a motion to dismiss the indictment for selective prosecution. The government's argument fails to recognize the fundamental difference between a discovery motion on a selective prosecution claim and a motion to dismiss the indictment for selective prosecution. As the court of appeals in this case correctly points out: "The standard for a discovery showing is lower than that for a *prima facie* case." *United States v. Armstrong*, 48 F.3d 1508, 1513

(9th Cir. 1995). The government concedes in its brief that the "showing necessary to permit a court to order discovery on a selective prosecution claim does not require proof of a prima facie case of selective prosecution." (Gov't. Brief p. 25)

Justice Reinhardt also noted in his dissenting opinion in the original panel decision: "If they could make such a showing without any discovery, there would be no need for discovery in the first place." *United States v. Armstrong*, 21 F.3d 1431, 1439 (9th Cir. 1994) (Reinhardt, J. dissenting). While proof of a particular case of one White defendant who commits a cocaine base offense and is not prosecuted in federal court may arguably be necessary for a motion to dismiss the indictment for selective prosecution, it is not an essential requirement for the granting of a discovery motion on selective prosecution.⁴ As Justice Marshall noted in the *Wayte* decision, "most of the relevant proof in selective prosecution cases will normally be in the Government's hands." *Wayte v. United States*, 470 U.S. 598, 624 (1985).

On a discovery motion, all that is required is that the defendant present some evidence of a colorable basis for believing that discriminatory prosecutorial selections have occurred. A colorable basis is some evidence tending to show the essential elements of a selective prosecution claim. Establishing a colorable basis for believing

⁴ Since this case only involves a discovery motion, it is unnecessary to decide in this case what proof must be presented in order to prove the merits of a selective prosecution claim. The government did not petition the Court on that issue and it is not now before the Court for decision.

that other persons similarly situated have not been prosecuted does not mean that a defendant must offer into evidence specific facts and evidence establishing who these other persons are. All that is required at the discovery phase in order to meet the colorable basis test is some evidence which raises a reasonable inference that discriminatory prosecutorial selections have been made.

B. The Colorable Basis Test Is Met When A Defendant Has Presented Evidence Which Raises A Reasonable Inference That The Charges In His Case Are A Result Of Unconstitutional Selective Prosecution.

The Equal Protection Clause of the Fourteenth Amendment prohibits any state from taking action which would "deny to any person within its jurisdiction the equal protection of the laws." This admonition is applicable to the federal government through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Wayte v. United States*, 470 U.S. 598, 608 (1985).

In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), this Court applied the principles of equal protection of the law to the discriminatory enforcement of a San Francisco ordinance which prohibited a person from maintaining a laundry in a building not made of brick or stone without first obtaining a permit from the board of supervisors. Permits were only granted to non-Chinese applicants and Yick Wo, an unsuccessful applicant, was thereafter convicted and imprisoned for maintaining a laundry without a permit. Finding that the board had impermissibly discriminated against Chinese applicants, the Court declared

that Yick Wo's conviction and imprisonment violated the Equal Protection Clause. The Court stated that "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." 118 U.S. at 373-374.

A central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. *Washington v. Davis*, 426 U.S. 229, 239 (1976). Classifications of citizens solely on the basis of race "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Accord, *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Discrimination on the basis of race is especially pernicious in the administration of justice because it "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Rose v. Mitchell*, 443 U.S. 545, 555-556 (1974). See generally, *Developments - Race and the Criminal Process*, 101 Harv. L. Rev. 1520 (1988).

A claim of selective prosecution is to be judged according to ordinary equal protection standards and will require proof that an enforcement system "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. United States*, 470 U.S. 598, 608 (1985). The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Rather, a claim of selective prosecution must be

based upon a claim that the selection "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

To obtain discovery on a selective prosecution claim, a party need only show a "colorable basis" for the claim, which requires "some evidence tending to show the existence of the essential elements of the defense." *Wayte v. United States*, 470 U.S. 598, 624 (1985) (Marshall, J. dissenting); *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). In order for a discovery motion to be granted, it does not require proof of the elements of a selective prosecution claim to the same extent as would be needed on a motion to dismiss the indictment. Rather, a colorable basis can exist if a defendant's showing on a discovery motion raises a reasonable inference that he may be the victim of selective prosecution. For example, in one case a court stated that a discovery motion on a selective prosecution claim may be granted where the defendant presents "enough evidence to demonstrate a reasonable inference of invidious discrimination." *United States v. Redondo-Lemos*, 955 F.2d 1296, 1302 (9th Cir. 1992).⁵

⁵ In *United States v. Redondo-Lemos*, 955 F.2d 1296 (9th Cir. 1992) the court of appeal reviewed a district court's finding that the United States attorney was committing equal protection violations by treating male drug couriers more harshly in plea bargaining than similarly situated females. The court noted that a district judge who perceives a pattern of invidious enforcement has ample authority under the court's supervisory powers to raise the matter sua sponte. The court also held that if invidious discrimination is proven, one remedy could be a reduction of a defendant's sentence. However, on the record presented, the court found no evidence of intentional discrimination and reversed and remanded for further proceedings. The

The "reasonable inference" concept arises directly from this Court's reasoning in *Batson v. Kentucky*, 476, U.S. 79, 93-97 (1986). In *Batson*, this Court held that it is a violation of equal protection for a prosecutor in a criminal case to use his peremptory challenges to remove trial jurors on the basis of their race. Recognizing that an equal protection violation would require purposeful discrimination, the Court stated that a pattern of strikes against Black jurors may give rise to an "inference of purposeful discrimination." *Ibid.* at p. 96. The burden then shifts to the prosecution to come forward with a neutral explanation for challenging Black jurors. *Ibid.* at p. 97. The same logical approach exists in respondents' case, where the showing on the discovery motion raised a reasonable inference that prosecutors were selecting only Black defendants for prosecution in federal court for cocaine base offenses where the penalties were higher than in state court. The trial court, finding a colorable basis of selective prosecution, granted the discovery motion and ordered the government to respond with an

court stated that a district judge's own observations of disparate impact establishes a prima facie case of selective prosecution, but without more, is an insufficient basis for finding that the prosecutor was motivated by a discriminatory purpose. Upon remand, the district court conducted an evidentiary hearing concerning the U.S. Attorney's office policy concerning plea bargaining and its relationship to gender. The district court again found gender discrimination and reduced the sentences. On the government's appeal the Ninth Circuit again reversed the district court, ruling that the evidence did not support the district court's finding of gender-based selective prosecution. *United States v. Redondo-Lemos*, 27 F.3d 439 (9th Cir. 1994).

explanation which would either prove or disprove the claim of purposeful discrimination.

The lesser showing required for discovery as compared to a claim on the merits is the reason that this Court's decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987) is distinguishable. In *McCleskey*, this court held that statistics establishing a higher percentage of Black defendants receiving the death penalty in the state of Georgia did not alone prove that the decisionmakers in those cases acted with a discriminatory purpose in violation of the Equal Protection Clause. However, the *McCleskey* case was not a case involving the issue of discovery. It was a ruling on the merits of an argument made to vacate a death sentence in a murder case. The respondents in this case have not yet made a motion to dismiss the indictment for selective prosecution. They have only made a motion for discovery. Even if the statistical evidence is found to be insufficient to prove the merits of a selective prosecution claim, it does not follow that statistical evidence is valueless. If the statistical evidence raises a reasonable inference of selective prosecution, then it should be sufficient to warrant the granting of a discovery motion on a selective prosecution claim.

The use of the term "reasonable inference" in defining colorable basis is also consistent with the approach taken by this Court in cases involving claims of racial discrimination in the grand jury selection process. *Castaneda v. Partida*, 430 U.S. 482 (1976); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Whitus v. Georgia*, 385 U.S. 545 (1967). In cases involving claims of racial discrimination

in the selection of the grand jury, this Court has permitted the use of statistical evidence to establish an inference of purposeful discrimination. *Castaneda v. Partida*, *supra* at 492-498. See also, *Turner v. Fouche*, 396 U.S. 346, 360-361 (1970); *Bazemore v. Friday*, 478 U.S. 385, 397-404 (1986) (Error to exclude statistical evidence when offered to prove racial discrimination). In *Hernandez v. Texas*, 347 U.S. 475 (1954), where a defendant showed that fourteen percent of the population was Mexican-American, but no Mexican or Latin American name had ever appeared on either a grand or petit jury list in the past twenty-five years, this Court stated: "The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner." *Id.* at 482. "Once a defendant has shown a substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case." *Castaneda v. Partida*, *supra* at 495.

Although the burden of proving purposeful discrimination is on the defendant, *Batson v. Kentucky*, 476 U.S. 79, 93 (1986), the defendant may rely upon circumstantial evidence of invidious intent based upon proof of a disproportionate impact in the application of the law. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977); *Washington v. Davis*, 426 U.S. 229, 242 (1976). "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). "Sometimes a clear pattern, unexplainable on grounds other than race,

emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). See also, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).⁶ "If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process." *Castaneda v. Partida*, 430 U.S. 482, 494.

All of the equal protection cases cited above, which discuss the inference of purposeful racial discrimination from evidence of government action causing a discriminatory effect, have involved the merits of an equal protection claim. Since respondents' case involves the showing needed for obtaining discovery, it would seem logical to require a lesser showing of evidence of a disparity in order to infer purposeful racial discrimination. For that

⁶ *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), are examples of cases in which a statistical pattern of discriminatory impact demonstrated a constitutional violation. In *Gomillion*, a state legislature violated the Fifteenth Amendment by altering the boundaries of a particular city "from a square to an uncouth twenty-eight sided figure." 364 U.S. at 340. The alterations excluded 395 of 400 black voters without excluding a single white voter. In *Yick Wo*, an ordinance prohibited operation of 310 laundries that were housed in wooden buildings, but allowed such laundries to resume operations if the operator secured a permit from the government. When laundry operators applied for permits to resume operation, all but one of the over 200 Chinese applicants were unsuccessful.

reason, it is appropriate to define the term colorable basis as evidence which raises a reasonable inference of selective prosecution, when choosing a legal standard for discovery.⁷

C. District Courts Are Vested With Wide Discretion In Ruling On Discovery Issues And There Was No Abuse Of Discretion By The Court's Order Granting The Discovery Motion In This Case.

The district courts have wide discretion in ruling on discovery matters. The standard of review on appeal from a discovery order is the abuse of discretion standard. *United States v. Nixon*, 418 U.S. 683, 702 (1974);

⁷ Concerning the general law of discovery in criminal cases, this Court has stated that there is a "growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." *Dennis v. United States*, 384 U.S. 855, 870 (1966). "[T]he ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases." *Wardius v. Oregon*, 412 U.S. 470, 473 (1973) citing Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U.L.Q. 279.

In California state court criminal prosecutions a defendant may obtain discovery from the prosecutor by filing a motion for discovery describing the requested information with some degree of specificity and establishing "plausible justification." *Ballard v. Superior Court*, 64 Cal. 3d 159, 167, 49 Cal. Rptr. 302, 410 P. 2d 838 (1966). The California Supreme Court has applied the same standard of criminal discovery to discovery motions related to a claim of selective prosecution. *Murgia v. Municipal Court*, 15 Cal. 3d 286, 306, 124 Cal. Rptr. 204, 540 P. 2d 44 (1975); *Griffin v. Municipal Court*, 20 Cal. 3d 300, 306-307, 142 Cal Rptr. 286, 571 P.2d 997 (1977).

Wayte v. United States, 470 U.S. 598, 624 (1985) (Marshall, J., dissenting). A discovery order may not be set aside on appeal for an abuse of discretion unless the district court acted arbitrarily or made factual findings that have no support in the record. *United States v. Nixon*, *supra* at 702.

The exercise of judicial discretion "implies conscientious judgment, not arbitrary action . . . It takes account of the law and the particular circumstances of the case and 'is directed by the reason and conscience of the judge to a just result.'" *Burns v. United States*, 287 U.S. 216, 222-223 (1932). A party appealing to the discretion of the court "is entitled to fair judgment, and is not to be made a victim of whim or caprice." *Ibid.* at 223.

When a district court makes a factual finding that a defendant has made a colorable showing of selective prosecution, it is similar to a factual finding of intentional discrimination. Compare, *Anderson v. Bessemer City*, 470 U.S. 564 (1985). In *Anderson* the Court held that a district court's finding of discriminatory intent in a civil rights action is a factual finding that may be overturned on appeal only if it is clearly erroneous. *Anderson v. Bessemer City*, *supra* at 566, citing *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. Bessemer City*, *supra* at 573. "Where there are two permissible views of the evidence,

the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, *supra* at 574, citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). See also *Amadeo v. Zant*, 486 U.S. 212, 226 (1988).

In the district court, the respondents in this case filed a motion for discovery on a selective prosecution claim setting forth a statistical study prepared by the Federal Public Defender's office in Los Angeles. The study showed that in the 24 cases involving cocaine base charges closed by that office in 1991, all of the defendants were Black. (J.A. 68-70) The essence of the claim was that Black cocaine base offenders were being unconstitutionally selected for prosecution in federal court where the penalties were higher, rather than being prosecuted in state court where the penalties were lower.⁸

In response to the motion, the government presented no evidence at all. It merely argued that the respondents' showing failed to establish a colorable basis. (J.A. 149-150) The court granted the motion stating that "what the Court wants to know is whether or not there is any

⁸ In federal court, the crime of possession with intent to distribute cocaine base, involving 50 grams, carries a penalty of a mandatory minimum of 10 years to life. With one prior felony drug offense, the sentence is a mandatory 20 years to life. With two prior felony drug offenses, the sentence is a mandatory life without parole. 21 U.S.C. § 841(b).

In California state court, the crime of possession for sale of cocaine base involving 50 grams, carries a penalty of imprisonment for either 3, 4 or 5 years. Cal. Health & Saf. Code § 11351.5. If the defendant has no prior convictions, he may be granted probation. Cal. Health & Saf. Code § 11370. The court may impose an additional 3 years consecutive sentence for each prior felony drug conviction. Cal. Health & Saf. Code § 11370.2.

criteria in deciding which of these cases will be filed in state court versus Federal court and if so, what is the criteria . . . and if its not based on race what is it based on?" (J.A. 162)

The government filed a motion for reconsideration of the discovery order. In that motion the government presented the affidavits of two Assistant United States Attorneys, a D.E.A. agent, an A.T.F. agent, and an Inglewood Police Officer, all stating that race was not the reason for the prosecution in this case.⁹ (J.A. 71-81) The general criteria for prosecution was stated to be the amount of drugs (over 100 grams of cocaine base), multiple sales, a joint federal and state investigation, the use of firearms, the strength of the evidence, the existence of threats on arresting officers, and the existence of prior criminal records.¹⁰ (J.A. 80-81) D.E.A. Public Information Officer

⁹ This Court has stated on several occasions that simple protestation from government officials that racial considerations played no part in the selection process is insufficient to dispel a prima facie case of discrimination. *Castaneda v. Partida*, 430 U.S. 482, 498 n.19 (1976); *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972); *Hernandez v. Texas*, 347 U.S. 475, 481 (1954). In any event, it was for the district court to decide whether the protestations of racial neutrality had any weight in the final determination of whether respondents had shown a colorable basis of selective prosecution. In this case, the district court made an implied finding that they did not dispel the inference of discrimination raised by the respondents' motion.

¹⁰ The record indicates that the district court did not believe that the United States Attorney had made full disclosure of the charging criteria because of their argument that full disclosure would create a danger in revealing law enforcement strategies. (J.A. 192-193) The court stated "They haven't done it yet." (J.A. 193) The court also stated that "the government

Ralph Lockridge stated in his declaration that it was the experience of D.E.A. agents that "narcotics offenders as a whole cover an entire spectrum of different races, sexes, and religions." However, "[w]ith respect to cocaine base (or 'crack') virtually all major crack traffickers uncovered in the Los Angeles area have been Black." (J.A. 72-73)

The motion for reconsideration was opposed by respondents who filed declarations of their counsel. One counsel stated that she had spoken with a halfway house intake coordinator who told her that in his experience treating cocaine base addicts, Whites and Blacks dealt and used the drug in equal numbers. Another defense attorney asserted that his experience and conversations with judges, lawyers, and defendants led him to conclude that many non-Blacks were prosecuted for cocaine base offenses in state court. Finally, the respondents submitted an article from the *Los Angeles Times* disclosing sentencing statistics establishing that 92.6% of all persons sentenced for federal cocaine base offenses are Black, as opposed to 4.6% who are White. (J.A. 138-142, 208-210)

At the hearing on the motion for reconsideration of the discovery order, the government provided a list of all 2,400 federal narcotics prosecutions during the relevant

hasn't provided the information, who really does have the responsibility for making the decision" concerning which cocaine base cases would be prosecuted in federal court rather than state court. (J.A. 191) Ultimately, the district court made a factual finding that the government had not disclosed its true and complete criteria for determining which cases would be prosecuted in federal court. (J.A. 217)

three year period. It did not indicate which of the cases involved cocaine base and did not provide the race of the defendants. The government also provided the court with an informal survey of the United States Attorney's office and established that there had been seven other non-Black defendants prosecuted for cocaine base offenses in federal court. All of these defendants appeared from their names to be Hispanic. (J.A. 82-83) Conspicuously absent was any evidence that a White defendant had ever been prosecuted in federal court for a cocaine base offense.¹¹

The hearing on the motion for reconsideration, rather than indicating an abuse of discretion, was a model of a court carefully considering all aspects of the case and intelligently exercising its discretion. The district court was guided by a recent Ninth Circuit decision, *United States v. Bourgeois*, 964 F. 2d 935, 938 (9th Cir. 1992) which held that "To succeed on a selective prosecution claim,

¹¹ In a subsequent case involving a discovery motion on a selective prosecution claim in Los Angeles, the government responded with more statistical evidence showing that as of 1992, the date of the Armstrong discovery motion, the United States Attorney's office in Los Angeles had never prosecuted a White person in federal court for a cocaine base offense. *United States v. Turner*, 901 F. Supp. 1491, 1496 (C.D. Cal. 1995).

"Similar discriminatory patterns exist outside of Los Angeles. A 1992 Commission survey shows that only minorities were prosecuted for crack offenses in more than half the federal court districts handling crack cases. No Whites were federally prosecuted in 17 states and many cities, including Boston, Denver, Chicago, Miami, Dallas and Los Angeles. Out of hundreds of cases, only one White was convicted in California, two in Texas, three in New York and two in Pennsylvania." H.R. No. 104-272 reported in *U.S. Code Congressional & Administrative News*, 104th Congress, 1st Sess. pp. 335, 353 (Dec. 1995).

the defendant bears the burden of showing both 'that others similarly situated have not been prosecuted and [also] that the prosecution is based on an impermissible motive.' " The *Bourgeois* case had attempted to apply this Court's decision in *Wayte v. United States*, 470 U.S. 598 (1985) to the issue of discovery.

At the conclusion of the second full hearing on the discovery order, the district court was left with essentially two available conclusions. The first was the government's argument that the high number of Black defendants being prosecuted in federal court for cocaine base offenses was explained because only Blacks were selling crack cocaine. The second was the respondents' argument that the high number of Black defendants being prosecuted in federal court (where the penalties were higher) as opposed to state court (where the penalties were lower) was because Black defendants were being selectively prosecuted on the basis of race. Compare, *Anderson v. Bessemer City*, *supra* at 573-574 (District Court has discretion to make either finding); *United States v. Marshall*, 56 F. 2d 1210 (9th Cir. 1995) (No abuse of discretion in denying a discovery motion based upon the same FPD statistics).

The district court ultimately held that the discovery order would stand and denied the motion for reconsideration. On the narrow issue of whether the respondents' motion for discovery had established a colorable basis for selective prosecution, the district court decided that it did. The court stated:

The statistical data provided by the Defendant raises a question about the motivation of the Government which could be satisfied by the

Government disclosing criteria, if there is any criteria, for bringing this case and others like it in Federal court.

Without the criteria, the statistical data is evidence and does suggest that the decision to prosecute in Federal court could be motivated by race. (J.A. 217)

In finding a colorable basis for the claim of selective prosecution, the district court was saying that the statistical showing of the 24 cases handled by the Federal Public Defender and the other evidence presented in the declarations of defense counsel, had raised a reasonable inference that the respondents were being prosecuted in federal court as opposed to state court because of their race. Indeed, it is important to recognize that an intentional racially motivated selective prosecution practice would also produce the same results, namely, all of the prosecutions for cocaine base in federal court would be against Black defendants. Compare, *Strauder v. West Virginia*, 100 U.S. 303 (1880) (Intentional discrimination resulted in no Blacks serving on grand juries for 12 years); *Hernandez v. Texas*, 347 U.S. 475 (1954) (Intentional discrimination resulted in no Hispanics serving on grand juries for 25 years); *Brown v. Board of Education*, 347 U.S. 483 (1954) (Intentional racial discrimination resulted in no Blacks attending segregated public schools).

The government argues that the court of appeals' decision in this case improperly relied upon a presumption that people of all races commit all types of crimes and that in cases involving racial discrimination it is unnecessary to present evidence that similarly situated persons were not prosecuted. Neither statement in the

court of appeals' decision should be viewed as creating new law. Rather the statements are recognition that each case must be decided on its own facts. Certainly statistics showing that 100% of those sentenced for antitrust violations were White, would not be significant enough to establish a colorable basis of selection prosecution.

On the other hand, respondents' case is significantly different because of two important factors. The first factor is that the claim of racial discrimination involves discrimination against a racial minority. Black Americans are a racial minority in the United States that historically have been subjected to racial discrimination. The history of this discrimination and its origins are fully detailed in Justice Marshall's dissenting opinion in *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 387-401 (1978). See also, *United States v. Clary*, 846 F. Supp. 768 (E.D. Mo. 1994) overruled in *United States v. Clary*, 34 F.3d 709 (8th Cir. 1994). In *Strauder v. West Virginia*, 100 U.S. 303 (1880) this Court held unconstitutional a state statute making Blacks ineligible to serve on juries. In reversing Strauder's murder conviction, the Court established that the Constitution protects racial minorities in the criminal justice system of a society in which "[d]iscriminations against them had been habitual." *Ibid.* at 306. See also, *Vasquez v. Hillery*, 474 U.S. 254 (1986). As recently as 1967, this Court was called upon to strike down racially discriminatory statutes affecting Black Americans. *Loving v. Virginia*, 388 U.S. 1 (1967).

The second important factor is that the claim of racial discrimination is made in a case involving cocaine base or "crack." Since its enactment, the harsh penalties in the Anti-Drug Abuse Act of 1986 for cocaine base offenses

have fallen almost exclusively upon Black Americans. Despite the fact that Black Americans comprise only 12% of the population, 92.6% of those sentenced to federal prison are Black, as opposed to 4.6% who are White. With respect to powder cocaine, the percentages are largely reversed.¹² (J.A. 209-210) In a Sentencing Commission report to Congress on this problem it states:

"In the course of our study, we were faced with clear evidence that crack cocaine penalties are imposed largely on African-Americans. Almost 90 percent of federal crack offenders are Black. This disproportionate impact creates a perception of unfairness and raises allegations of racial bias. Everyone concerned with the legitimacy of the criminal justice system – and with the willingness of all citizens to accept its judgment as fair and final – must be troubled by allegations of unfairness, particularly racial discrimination." *U.S. Sentencing Commission: Materials Concerning Sentencing For Crack Cocaine*

¹² In the Eastern District of Missouri between 1988 and 1992, 98.2% of those convicted of federal crack cocaine charges were Black. *United States v. Clary*, 34 F.3d 709, 711 (8th Cir. 1994). In the Eastern District of Washington, 91% of all federal crack cocaine prosecutions were brought against Black Americans, while less than 1% of the population is Black. *United States v. Dumas*, 64 F.3d 1427, 1429 (9th Cir. 1995). In the Central District of California, out of the 149 defendants who were charged with federal crack cocaine offenses from 1992 to 1995, 74.7% were Black, 19.2% were Hispanic and 5.5% were Asian. *United States v. Turner*, 901 F. Supp. 1491, 1496 (C.D. Cal 1995). The court in *Turner* found that only one, out of 149 persons prosecuted, was White, and the evidence raised an irresistible inference that he was deliberately targeted so that a White person could be included in subsequent prosecution statistics. (*Ibid.*)

Offenses, 57 Criminal Law Reporter 2127, 2131 (May 31, 1995).

Most of the cases involving cocaine base offenses involve relatively small quantities of the drug. However, small quantities of cocaine base will bring lengthy sentences, when compared to the sentences imposed for powder cocaine.¹³ The actual sentencing ratio is 100 to 1 between the sentences for crack cocaine and powder cocaine.¹⁴ "Under the 100 to 1 quantity ratio, an offender must distribute 100 times as much powder cocaine as a similar crack offender to receive the same base sentence. Thus, all crack offenders, whether violent or non-violent, receive the especially severe sentences." *United States Sentencing Commission: Materials Concerning Sentencing For Crack Cocaine Offenses*, 57 Crim. L. Rptr. 2127, 2129 (May 31, 1995).

Recognizing the disparate treatment between crack and powder cocaine offenders and recognizing the

¹³ For example, a drug trafficker with 70 grams of crack has a mandatory minimum sentence of 10 years and a Guideline sentence range of 121 to 155 months. A drug trafficker with 70 grams of powder cocaine has no mandatory minimum and has a Guideline range of 21 to 27 months. (J.A. 209-210) See, *United States Sentencing Guidelines* § 2D1.1 and 21 U.S.C. §§ 841(b) and 960(b).

¹⁴ Title 21 U.S.C. Sections 841(b) and 960(b) establish the 100 to 1 quantity ratio between powder and crack cocaine. They mandate a minimum sentence of at least five years for first offenders whose offense involves 5 grams of crack or 500 grams of powder, and a ten-year sentence for offenses involving 50 grams of crack or 5 kilograms of powder. Repeat offenders receive lengthier sentences.

unusually large numbers of Blacks incarcerated for federal crack offenses, the United States Sentencing Commission recommended that the Sentencing Guidelines be changed to equalize penalties for similar quantities of crack and powder cocaine by eliminating the 100 to 1 drug quantity ratio. See, Amendment 5, in U.S. Sentencing Commission, *"Amendments to the Sentencing Guidelines"* (May 1, 1995). However, Congress passed legislation blocking the changes in the Guidelines and the President signed into law a bill which retains the 100 to 1 ratio. P.L. 104-38; 109 Stat. 334. Nevertheless, a dissenting view of ten members of the House of Representatives Judiciary Committee was published in the House Report, stating that treating crack cocaine different from powder cocaine "makes the current federal sentencing scheme discriminatory on its face." H.R. No. 104-272 reported in *U.S. Code Congressional & Administrative News*, 104th Congress, 1st Sess., pp. 335, 352 (Dec. 1995).¹⁵

¹⁵ The dissenting view in the House Report also states:

"No analysis of the racially discriminatory impact of the current federal sentencing scheme is complete without discussion of the laws' targeted enforcement by federal law enforcement. According to a recent Los Angeles Times article, the U.S. Attorney's office in Los Angeles openly admits to targeting its resources towards minority communities. In an interview, Los Angeles U.S. Attorney Nora Manella acknowledged that federal agents have focused their resources in minority communities, where the crack trade is believed to be the most prevalent and violent. As a result of this acknowledged targeting of minority communities in the Los Angeles area, not a single white has been convicted of a crack cocaine offense in

The controversy over the disparate sentences between crack and powder cocaine and the fact that federal prisons are being filled with large numbers of Black defendants, sentenced to long prison terms for cocaine base offenses, are an important background to the discovery motion in this case. As the Los Angeles Times noted "No drug is more closely associated with race than crack cocaine." "Harsher Crack Sentences Criticized as Racial Inequality," *Los Angeles Times* (Nov. 23, 1992) (J.A. 208-209) Given this background, the claim of selective prosecution was appropriately raised in this case.

Admittedly, the district court in respondents' case did not resolve the difficult question of the merits of the selective prosecution claim raised in this case. The district court only ruled that discovery was properly ordered and that respondents' statistical evidence and declarations established a colorable basis for their claim of selective prosecution. Under the facts of this case, the district court did not abuse its discretion.

—————●—————

federal courts serving Los Angeles and its six surrounding counties since Congress enacted its mandatory sentences for crack dealers in 1986. Instead, virtually all white offenders are prosecuted in state court, where sentences are far less, with differences of up to eight years for the same offense." H.R. No. 104-272.

CONCLUSION

The judgment of the court of appeals should be affirmed.¹⁶

Respectfully submitted,

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¹⁶ Dismissal of the indictment was the correct sanction for the government's refusal to obey the district court's lawful discovery order. See *Alderman v. United States*, 394 U.S. 165, 210 (1969); *Jencks v. United States*, 353 U.S. 657, 672 (1957). The government has not argued otherwise in its brief.

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October Term, 1945

UNITED STATES OF AMERICA,

Petitioner,

CHRISTOPHER LEE ARMSTRONG, et al.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

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TABLE OF CONTENTS

	Page
CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED.....	1
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT.....	14
ARGUMENT	17
I. DEFENDANTS ARE ENTITLED TO DIS- COVER EVIDENCE MATERIAL TO A DEFENSE OF SELECTIVE PROSECUTION ..	18
II. NO SPECIAL STANDARDS ARE NECES- SARY OR APPROPRIATE IN RESOLVING DISCOVERY REQUESTS RELATED TO, OR THE MERITS OF, A SELECTIVE PROSECU- TION DEFENSE	26
A. General Discovery Principles Adequately Protect the Government from Improper Discovery	26
B. Proof of the Existence of "Similarly Situ- ated" Non-Minorities Is Not a Necessary Element of a Selective Prosecution Defense	38
C. No Special Heightened Standard of Proof Should Be Applied to a Defense Based on Racial Discrimination by Prosecutors or Other Law Enforcement Officials.....	50
III. THE DISTRICT JUDGE DID NOT ABUSE HER DISCRETION IN ORDERING THE LIM- ITED DISCOVERY IN THIS CASE	53
CONCLUSION	59

TABLE OF AUTHORITIES

Page(s)

CASE(S)

<i>Ah Sin v. Wittman</i> , 198 U.S. 500 (1905)	43, 44
<i>Anderson v. Bessemer City</i> , 470 U.S. 564 (1985)	15, 25
<i>Arlington Heights v. Metropolitan Housing Development Corp.</i> , 429 U.S. 252 (1977)	51
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	<i>passim</i>
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	20, 21
<i>Castaneda v. Partida</i> , 430 U.S. 482 (1977)	51
<i>County of Washington v. Gunther</i> , 452 U.S. 161 (1981)	16, 42
<i>Eisen v. Carlisle & Jacquelin</i> , 417 U.S. 156 (1974)	29
<i>Harman v. Forssenius</i> , 380 U.S. 528 (1965)	41
<i>Herbert v. Lando</i> , 441 U.S. 153 (1979)	24, 34, 36
<i>Hernandez v. New York</i> , 500 U.S. 352 (1991)	25
<i>Hickman v. Taylor</i> , 329 U.S. 495 (1947)	23
<i>Hunter v. Underwood</i> , 471 U.S. 222 (1985)	16, 40, 41
<i>Jencks v. United States</i> , 353 U.S. 657 (1957)	20
<i>Kerr v. United States District Court</i> , 426 U.S. 394 (1976)	24
<i>Leatherman v. Tarrant County Narcotics Unit</i> , 507 U.S. 163, 113 S. Ct. 1160 (1993)	15, 27, 28
<i>Louisiana v. United States</i> , 380 U.S. 145 (1965)	41
<i>McCleskey v. Kemp</i> , 481 U.S. 279 (1987)	52
<i>McCray v. United States</i> , 195 U.S. 27 (1904)	44

TABLE OF AUTHORITIES - Continued

Page(s)

<i>McDonald v. Santa Fe Trail Transportation Co.</i> , 427 U.S. 273 (1976)	41
<i>Palmer v. Thompson</i> , 403 U.S. 217 (1971)	44
<i>Personnel Administrator of Massachusetts v. Feeney</i> , 442 U.S. 256 (1979)	51
<i>Schlagenhauf v. Holder</i> , 379 U.S. 104 (1965)	29
<i>Société Nat. Ind. Aéro. v. United States District Court</i> , 482 U.S. 522 (1987)	25
<i>St. Mary's Honor Center v. Hicks</i> , 113 S. Ct. 2742 (1993)	41
<i>Swain v. Alabama</i> , 380 U.S. 202 (1965)	<i>passim</i>
<i>Taylor v. Illinois</i> , 484 U.S. 400 (1988)	21
<i>United States v. Adams</i> , 870 F.2d 1140 (6th Cir. 1989)	31
<i>United States v. Aguilar</i> , 883 F.2d 662 (9th Cir. 1989)	36
<i>United States v. Bagley</i> , 473 U.S. 687 (1985)	21
<i>United States v. Berrios</i> , 501 F.2d 1207 (2d Cir. 1974)	37
<i>United States v. Bishop</i> , 959 F.2d 820 (9th Cir. 1992)	39
<i>United States v. Bourgeois</i> , 964 F.2d 935 (9th Cir. 1992)	25, 36
<i>United States v. Burr</i> , 25 Fed. Cas. 30 (1807) (Marshall, C.J.)	19, 21
<i>United States v. Caldwell</i> , 543 F.2d 1333 (D.C. Cir. 1974)	28
<i>United States v. Fares</i> , 978 F.2d 52 (2d Cir. 1992)	36

TABLE OF AUTHORITIES – Continued

Page(s)

<i>United States v. Gomez-Lopez</i> , 62 F.3d 304 (9th Cir. 1995).....	36
<i>United States v. Goodwin</i> , 457 U.S. 368 (1982)	52
<i>United States v. Greenwood</i> , 796 F.2d 49 (4th Cir. 1986).....	36
<i>United States v. Gutierrez</i> , 990 F.2d 472 (9th Cir. 1993).....	39
<i>United States v. Heidecke</i> , 900 F.2d 1155 (7th Cir. 1990).....	49
<i>United States v. Holmes</i> , 794 F.2d 345 (8th Cir. 1986)	36
<i>United States v. Jamar</i> , CR 95-432-WMB (CDCA)	13
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)... 20, 24, 35, 37	
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	44
<i>United States v. Penagaricano-Soler</i> , 911 F.2d 833 (1st Cir. 1990)	36
<i>United States v. Redondo-Lemos</i> , 955 F.2d 1296 (9th Cir. 1992)	25, 33
<i>United States v. Scafe</i> , 822 F.2d 928 (10th Cir. 1987)	28
<i>United States v. Washington</i> , CR 91-632-TJH (CDCA)	13
<i>United States Dep't of Labor v. Triplett</i> , 494 U.S. 715 (1990)	58
<i>Wade v. United States</i> , 504 U.S. 181	22
<i>Wardius v. Oregon</i> , 412 U.S. 470 (1973).....	20
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	44
<i>Washington v. Davis</i> , 426 U.S. 229 (1976).....	40

TABLE OF AUTHORITIES – Continued

Page(s)

<i>Wayte v. United States</i> , 470 U.S. 598 (1985).....	<i>passim</i>
<i>White v. Regester</i> , 412 U.S. 755 (1973).....	26

RULES AND STATUTES

U.S. Const. Amend. V	1, 16
18 U.S.C. § 242	1, 58
18 U.S.C. § 924(c)	2, 3
18 U.S.C. § 3500.....	27
18 U.S.C. § 3624(b)(1).....	3
21 U.S.C. § 841	2, 3, 56, 57
21 U.S.C. § 846	2, 3, 56, 57
28 U.S.C. § 994(d)	1, 58
29 U.S.C. § 206(d)(1).....	42
Equal Pay Act.....	16
Title VII of 1964 Civil Rights Act	16
Fed. Rule of Civil Procedure 11.....	14, 22
Fed. Rule of Civil Procedure 34a.....	19
Fed. Rule of Civil Procedure 35a.....	29
Fed. Rule of Crim. Pro. 2.....	48
Fed. Rule of Crim. Pro. 12(b)	20
Fed. Rule of Crim. Pro. 15.....	28
Fed. Rule of Crim. Pro. 16.....	<i>passim</i>
Fed. Rule of Crim. Pro. 17(c)	1, 20

TABLE OF AUTHORITIES - Continued

	Page(s)
Local Rules, C.D. Cal., Civil Rule 7.15	29
Cal. Health and Safety Code § 11351.5	2, 3
Cal. Health and Safety Code § 11352	2
Cal. Health and Safety Code § 11370.1	3
Cal. Health and Safety Code § 11370.2	3
Cal. Penal Code § 667.5	3
Cal. Penal Code § 1170.1	3
Cal. Penal Code § 2931	3
Cal. Penal Code § 2933	3
MISCELLANEOUS:	
<i>Materials Concerning Sentencing for Crack Cocaine Offenses</i> , 57 Crim. Law. Rep. 2127 (May 31, 1995)	37
<i>Notes of Advisory Committee to 1974 Amendments to Federal Rules of Criminal Procedure</i>	19
<i>Preliminary Data on Race and Crack Charging Prac- tices in Los Angeles</i> , R. Berk and A. Campbell, 6 Fed. Sent. R. 36 (1993)	12
<i>United States Sentencing Comm'n Special Report to the Congress: Cocaine and Federal Sentencing Pol- icy</i> (Feb. 1995)	14

CONSTITUTIONAL PROVISION,
STATUTES AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part, "No person shall be . . . deprived of life, liberty or property, without due process of law."

Section 242 of Title 18 U.S.C. provides in pertinent part:

Whoever, under color of any law, . . . willfully subjects any inhabitant of any State to . . . different punishments, pains, or penalties, . . . by reason of his color, or race, . . . shall be fined not more than \$1000 or imprisoned not more than one year, or both. . . .

Section 994(d) of 28 U.S.C. provides in pertinent part, "The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race . . . of offenders."

Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure provides in pertinent part:

Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, . . . or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense. . . .

Criminal Rule 17(c) provides in pertinent part:

For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books,

papers, documents, or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.

STATEMENT OF THE CASE

(1) In 1992, respondents were arrested on charges of distributing cocaine base (crack), illegal possession and use of handguns, and conspiracy. The criminal conduct alleged was prohibited by both federal¹ and California law.² The investigation which led to those arrests had been initiated by the Los Angeles Police Department³, and local police were involved throughout the investigation as well as in several of the arrests. The United States Attorney's Office for the Central District of California determined to prosecute the respondents in federal court. Accordingly, on April 21, 1992, respondents were indicted by a grand jury in that district.

The decision to pursue federal charges against respondents was a momentous one. Both the minimum and maximum sentences imposed by federal law are far higher than those established by California law. The difference in potential sentence varied with the charges and prior record, if any, of each of the defendants.

¹ 21 U.S.C. §§ 841(a)(1) (distribution of crack), 846 (conspiracy); 18 U.S.C. § 924(c) (firearms).

² Cal. Health and Safety Code, §§ 11351.5, 11352.

³ J.App. 75-76.

	Potential Sentence ⁴	
	State Sentence	Federal Sentence
Armstrong	3-9 years	55 years to life
Hampton	3-14 years	Mandatory life term
Mack	3-5 years	10 years to life
Martin	3-10 years	35 years to life
Rozelle	3-13 years	45 years to life

In practice, the differences are even greater because inmates in state prison receive an unlimited amount of good time credit at the rate of one day of credit for each day of good time⁵, whereas good time credits for federal inmates are capped at 54 days per year.⁶ Thus a state inmate with a 5 year sentence may serve as few as 30 months, while a federal prisoner with the same sentence must serve at least 51 months.

(2) In July, 1992, respondents, all of whom are black, filed a motion alleging that they had been selected for federal prosecution because of their race, and seeking discovery. The motion requested an order directing the government to provide respondents with "documentary evidence or information" regarding four matters: (a) the race of other individuals prosecuted for crack distribution either under federal statutes or "under state statutes applicable to the distribution of cocaine base" (b) the race

⁴ California Health and Safety Code §§ 11351.5, 11352, 11370.1, 11370.2; California Penal Code §§ 667.5, 1170.1; 21 U.S.C. §§ 841(a)(1), 846, 924(c). The sentences in each case include enhancements, as provided by law, for prior convictions and for firearms violations.

⁵ California Penal Code §§ 2931, 2933.

⁶ 18 U.S.C. § 3624(b)(1).

of individuals who had been arrested in federal or joint federal-state investigations, (c) the race of individuals who "use, distribute, or possess with intent to distribute cocaine base", and (d) the standards regarding which crack cases "will be accepted for federal prosecution and when such cases will be referred or left to the state authorities for prosecution." (Motion for Discovery and/or Dismissal of Indictment for Selective Prosecution, p. 2-3.)

In support of the motion, respondents submitted a study compiled by the Federal Public Defender of every crack case closed by that office in 1991⁷. The study identified twenty-four such cases; in every instance the defendant against whom the charges had been brought was black. (J.App. 68-70) At the September 8, 1992, hearing on the motion, counsel for the Federal Public Defender explained that the office had sought without success to obtain comparable information about state prosecutions, and that the motion asked that federal officials be directed to produce such information because federal and state officials "have access to one another's data."⁸ Neither in its written response to the motion for this information nor at the September, 1992, hearing did the government dispute respondents' contention that the United States Attorney, but not the respondents, had possession of or access to this information.

⁷ The study was based on several weeks of work by a paralegal who reviewed all Federal Public Defender cases for the period. J.App. 153, 159.

⁸ J.App. 156; see also *id.* at 146 ("it is considerably more difficult for us to obtain information from law enforcement, and statistics that we believe must be available simply by the nature of the U.S. attorney's office").

In our discovery motion, respondents specifically invited the government to "offer some explanation" for the results of the study.⁹ The written response submitted by the United States Attorney, however, made no effort to do so. At the hearing on the motion, the district judge expressed understandable concern that "the Government hasn't offered any explanation at all as to why . . . persons . . . being brought . . . to Federal court for these drug offenses . . . all . . . are black."¹⁰ Surprisingly, counsel for the government responded that he had no idea why this had occurred. "I can't explain why the public defender's office has only encountered black defendants [in] crack cocaine cases - I would have no explanation for that."¹¹

In the face of this response, the district judge granted the motion for the requested discovery.¹² With regard to the requested documents or information regarding the patterns of crack prosecutions, the court limited the discovery required to a three year period from 1989 through 1991.¹³ The judge emphasized that "what the Court wants to know is whether or not there is any criteria in deciding which of these cases will be filed in state court versus Federal court and if so, what is that criteria."¹⁴

⁹ Motion for Discovery and/or Dismissal for Selective Prosecution, p. 11.

¹⁰ J.App. 149.

¹¹ J.App. 150.

¹² J.App. 150, 161-62.

¹³ J.App. 153, 162.

¹⁴ J.App. 162.

After the district judge had granted the motion from the bench, counsel for the government for the first time argued that some effort might be required to produce the statistical information; in response the district judge offered to "give some guidance and make additional rulings if Government's Counsel requests" narrowing or clarifying the discovery order.¹⁵ In light of that argument, the district judge repeatedly asked counsel for the government to advise the court how much delay would be needed to comply with the discovery order.¹⁶ The district court also agreed to a request from the prosecution that it be accorded an opportunity to submit a separate memorandum regarding whether the government's criteria for selecting the narcotics cases to be filed in federal court might be exempt from discovery.¹⁷

(3) The United States moved for reconsideration of the district court's discovery order. The United States Attorney represented to the District Court that in any case in which there was so much as "one scintilla of evidence"¹⁸ of selective prosecution, the government would voluntarily "initiate a full and complete investigation into it and would expend whatever resources necessary", even if any discovery motion at issue "failed to meet the legal requirement" for discovery.¹⁹ The government insisted, however, that a district judge could not order or conduct such an inquiry into the same issue

¹⁵ J.App. 152.

¹⁶ J.App. 151, 158, 159, 162-63.

¹⁷ J.App. 163.

¹⁸ J.App. 179.

¹⁹ Government's Motion for Reconsideration, p. 5 n.1.

unless the defendant first met a high evidentiary threshold. The government supported its motion with several declarations and certain documentary material; respondents in turn introduced additional declarations. These conflicting presentations raised several complex factual disputes.

The United States sought in several ways to attack the probativeness of the initial Public Defender study. First, the government offered materials which it argued showed that the all-black group identified by the study was the result, at least in part, of a tendency of blacks to predominate in the sale of crack.²⁰ Respondents in reply adduced two declarations stating that there were a substantial number of non-black crack users and dealers. (J.App. 138, 140). One of the declarations was from a member of the Board of Directors of the Los Angeles Criminal Courts Bar Association Indigent Defense Panel, the primary source of private court-appointed counsel for indigent state defendants in Los Angeles County. Based on his own litigation experience, as well as on what he had learned while serving as a Director of that panel, he

²⁰ Counsel for the government summarized its evidence, and contentions, as follows: "[P]art of the reason why there apparently seem to be so many black defendants that are coming forth in these sort of prosecutions, is that the particular type of narcotic is controlled, *in the large part*, by street gangs . . . [that] operate out of areas that are very heavily minority, and so as a result of that, *oftentimes*, the type of dealers . . . are from these street gangs [whose] . . . membership . . . is *fairly minority heavy*, specifically black African Americans." J.App. 170 (Emphasis added).

concluded that there were numerous non-black defendants being prosecuted in state court for crack sales, many of whom had prior narcotics convictions. (J.App. 141). Second, an Assistant United States Attorney asserted that his office had been able to identify eleven non-black crack dealers who had been prosecuted in federal court.²¹ Respondents pointed out, in rebuttal, that all of the defendants identified were Asian or hispanic, and that this survey concerned a decidedly different pool (all federal prosecutions over a three year period) than the Federal Public Defender Study (cases closed by that office in a single year).²² Third, the government relied on argument of counsel criticizing the scope of that study.²³ Neither party objected to the admissibility of the other's evidence; the dispute concerned the conflicting factual inferences to be drawn from each. The district judge concluded that it would be inappropriate to hold, "without expert testimony"²⁴, that the results of the Federal Public Defender study stemmed from a paucity of non-black crack dealers.

The United States also sought to show that the defendants in this case had been selected for prosecution, not

²¹ J.App. 169, 201. The government identified five non-black defendants in a three year period who had been represented by the Federal Public Defender, an average of two per year.

²² J.App. 180, 203.

²³ J.App. 201 (only a single year); Government's Motion for Reconsideration, p. 8 (only Federal Public Defender cases).

²⁴ J.App. 217; see also J.App. 194 ("I think the expert is going to give us the answers to all these questions"), 204 (noting the lack of "any expert testimony".)

on the basis of race, but pursuant to race-neutral selection criteria. First, the government offered a declaration of the Los Angeles Police Department officer who had initiated the investigation. The LAPD officer insisted that when the investigation of the suspected Inglewood crack ring began, he "did not know" that any of the suspects were black; he also acknowledged, however, that he did know that the "overwhelming majority of crack dealers" in that geographic area were black.²⁵ Second, the government offered a declaration from the ATF agent in the case, who insisted the case was "recommended for prosecution" because it met "the guidelines of the United States Attorney's Office." (J.App. 78-79). That declaration, however, neither stated what the "guidelines" were nor identified the person to whom the recommendation had been made. The ATF agent's veracity was at that point under attack in this very case.²⁶ Third, the government offered a declaration of the Chief of the Criminal Complaints Section, who

²⁵ J.App. 75-76. Officer Campbell's September 15, 1992, declaration to this effect appears to be inconsistent with an affidavit which he had executed in April, 1992, to obtain a search warrant in this case. That affidavit stated that, when the officer was told by a confidential informant that a crack ring was being operated in Inglewood by Chris Armstrong and several others, "[y]our affiant recognized these names from a search warrant your affiant had executed on 1/17/92 . . . in Hawthorne, California. In the Hawthorne location your affiant found . . . Chris Armstrong. . . . Your affiant showed [the confidential informant] a photograph of Chris Armstrong, and [the informant] identified the photograph. . . ." Search Warrant and Affidavit, April 6, 1992, pp. 5-6.

²⁶ On June 10, 1992, the ATF agent, signed a statement provided to the defense in discovery asserting that he had run a check of the background of the government's key witness in this case, and that the witness had no criminal record. (Statement of

stated that the decision to bring the instant case was made because it "met the general criteria applied to all cases brought for consideration." (J.App. 80-81). The declaration, however, did not state what the criteria were; instead, it simply described seven different aspects of the instant case. Subsequently, counsel for the government suggested, somewhat equivocally, that those seven items were in fact the official criteria.²⁷

Counsel for respondents argued that these ostensible criteria could explain neither the pattern of prosecutions nor the decision to indict the defendants in this case. They noted that a number of the defendants did not satisfy the suggested criteria.²⁸ They also argued that several of the purported criteria – such as use of a gun in connection with a narcotics sale, or sale by a suspect with a criminal record – were applicable to large numbers of criminal defendants who were prosecuted only in state court.²⁹ The trial judge concluded that the government had failed to make clear the criteria, "if there is any

Jeffrey L. Cochran dated June 10, 1992.) On August 20, 1992, counsel for respondents subsequently introduced into evidence documents showing that the agent had actually run a check on July 13, 1992, and that the check revealed the witness had an extensive criminal record. (Defendant's Opposition to Governments' Motion for Deposition, Exhibits C, E)

²⁷ J.App. 170-71.

²⁸ J.App. 179 (respondent Martin), 183 (respondent Hampton), see also *id.* at 181 (arguing explanations of government officials were inconsistent.)

²⁹ J.App. 182-83 (state narcotics defendants charged with use of guns); J.App. 141, par. 7 (state crack defendants with criminal records.)

criteria, for bringing this case and others like it in Federal court"³⁰, and expressed concern that none of the government's declarations had indicated who had made the actual decision to commence the instant prosecution.³¹

Finally, there was an extended dispute at the December, 1992, hearing regarding whether it was feasible for the defendants themselves to obtain the data which the discovery order had required the United States to produce. First, the government argued that respondents could themselves identify all the crack prosecutions for the three years in question if they would "go sift through" a list of several thousand criminal cases which the government had produced³²; respondents objected that the list included *all* narcotics cases, not only crack cases, and that the government was "deluging us with all of the files to look through."³³ Second, the government argued "[i]t would be a very simple matter" for respondents to identify the race of all the defendants in the listed cases³⁴; respondents objected that it would be "virtually impossible" to do so, because racial identifications were not contained in the publicly available records.³⁵ Respondents also noted that the United States Attorneys' Office was ten times the size of the Federal Public Defender, and thus better able to identify the documents

³⁰ J.App. 217.

³¹ J.App. 191.

³² J.App. 176.

³³ J.App. 189.

³⁴ J.App. 176.

³⁵ J.App. 186-87.

or produce the information at issue.³⁶ The district judge concluded that information about "who was prosecuted . . . and where those persons were prosecuted is within the peculiar knowledge of the Government and therefore . . . it would be this Court's position that it is the Government that would have to provide that evidence."³⁷ The judge also stressed that "one factor to be considered . . . is . . . that if somebody has to get the information, it would be less costly if the Government were required to provide it than if the Defendants were required to try to obtain it."³⁸

(4) While this case has been on appeal, the record has to a significant degree been overtaken by events.

In 1993, under the auspices of the district court in a separate proceeding, a year long study of federal and state prosecutions was undertaken by UCLA professor Richard Berk regarding, inter alia, state crack prosecutions by the Los Angeles County District Attorney. The study identified some 8,250 charges in a twenty month period alleging sales of crack. 47% of these state charges, some 3830 in total, were against non-black defendants. Non-blacks accounted for 42% of all crack distribution arrests during this period.³⁹ In the court of appeals in the instant case, the United States suggested that crack dealers prosecuted in state court might in some relevant

³⁶ J.App. 193.

³⁷ J.App. 217.

³⁸ J.App. 190.

³⁹ A summary of the study was published in R. Berk and A. Campbell, *Preliminary Data on Race and Crack Charging Practices in Los Angeles*, 6 Fed. Sent. R. 36 (1993).

respects differ from those selected for prosecution in federal court, but did not question Berk's conclusion that there are in fact a large number of non-black crack dealers being prosecuted in state court in Los Angeles.⁴⁰

Subsequent to the district court proceedings in the instant case, Assistant United States Attorneys have in other cases in the Central District of California made additional representations regarding the criteria which they utilize in determining when to prosecute a narcotics case in federal court. On August 6, 1993, the government asserted that membership in a gang was one of the factors considered. (Government's Opposition to Defendant's Motion to Dismiss Re: Selective Prosecution, *United States v. Washington*, CR 91-632-TJH (CDCA))⁴¹ However, on December 13, 1993, the government disavowed that representation. (Hearing of December 13, 1993, CR 91-632-TJH)⁴² Currently, it appears the government is again asserting that alleged gang affiliation is a criterion for federal prosecution. (Government's Opposition to Defendant's Motion to Compel Discovery filed October 6, 1995, *United States v. Jamar*, CR 95-432-WMB (CDCA))⁴³ The United States initially asserted that there were no written guidelines regarding these selection decisions. (Hearing of September 27, 1993, p. 18-33 CR 91-632-TJH), but subsequently acknowledged that there were. (Hearings of

⁴⁰ Government's Response to Petition for Rehearing and Suggestion for Rehearing *En Banc*, pp. 13-14.

⁴¹ See Appendix A.

⁴² See Appendix A.

⁴³ See Appendix A.

October 28, 1993, p. 6-14 and December 13, 1993, p. 5-19, CR 91-632-TJH).⁴⁴

In February of 1995, the United States Sentencing Commission issued a Special Report to the Congress on Cocaine and Federal Sentencing Policy. Among its conclusions regarding race and trends in cocaine use was a finding that of those reporting use of crack cocaine in their lifetime, 65% were white, 26% were black and 9% were Hispanic.⁴⁵

SUMMARY OF ARGUMENT

(1) The discovery request in this case was for "documentary evidence or information" dealing with certain specified issues bearing on respondents' selective prosecution defense. It is governed by Rule 16(a)(1)(C), which requires the United States to provide defendants with copies of documents "material to the preparation of a defendant's defense."

The language of Rule 16 and well established discovery principles provide meaning to and significant safeguards on the document discovery available in a criminal case. Material documents may be obtained where, but only where, they relate to a genuine defense, and are not part of a fishing expedition. The genuineness of a defense can appropriately be gauged by the standard of Rule 11 of the Federal Rules of Civil Procedure, which requires absent special circumstances that factual allegations

⁴⁴ See Appendix A.

⁴⁵ *United States Sentencing Commission Special Report to the Congress: Cocaine and Federal Sentencing Policy* at 39. (February 1995)

"have evidentiary support." Discovery under Rule 16(a)(1)(C) can appropriately be limited to such claims.

The determination of whether there is an evidentiary basis for the defense on which a discovery request is grounded is a factual question to be made in the first instance by the district court, and can be overturned on appeal only for clear error. *Anderson v. Bessemer City*, 470 U.S. 564 (1985). Discovery decisions by a district judge may be reversed only for a demonstrable abuse of discretion.

(2) These general principles, not any special per se discovery rule, govern discovery requests related to a defense of selective prosecution. Rule 16 does single out certain types of discovery for special treatment, but discovery concerning selective prosecution is not among them. The courts are not free to engraft onto Rule 16 additional exceptions to its otherwise general language. *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 113 S. Ct. 1160 (1993).

The contours of the special discovery rule proposed by the United States are far from clear. The government refers to its proposal, variously, as requiring a "substantial and concrete basis", "solid credible evidence", "reasonable likelihood", a "substantial threshold showing", and "concrete[ness]." Adoption by this Court of such an ill-defined special standard will generate increased uncertainty and litigation. District judges have ample authority under the principles applicable to all Rule 16 discovery requests to prevent unwarranted or unduly burdensome discovery with regard to selective prosecution or any other defense.

(3) Unconstitutional selective prosecution can occur even where all or virtually all of the individuals who violate a particular statute are members of the same racial group. Government officials may not single out a particular offense for harsher penalties or more vigorous investigation or prosecution *because* those who commit that violation are likely to be members of a single minority group. *Hunter v. Underwood*, 471 U.S. 222 (1985).

The Equal Pay Act is narrowly framed to prohibit intentional discrimination only where there are men similarly situated to the female plaintiffs. But the guarantees of equal protection embodied in the Fifth Amendment, like the unrestricted prohibition of intentional discrimination in Title VII, apply to all invidiously motivated actions, regardless of whether there is a male or non-minority comparator. *County of Washington v. Gunther*, 452 U.S. 161 (1981).

In *Wayte v. United States*, 470 U.S. 598 (1985), the Solicitor General previously urged adoption of a "similarly situated" requirement for selective prosecution cases, but this Court properly declined to utilize that standard.

(4) The district judge did not abuse her discretion in ordering the limited discovery at issue in this case.

Counsel for respondents clearly had a colorable basis for asserting a defense of selective prosecution. A study by the Federal Public Defender revealed that all crack cases closed by that office in a one year period involved black defendants. The United States does not contend that there was some obvious and incontrovertible innocent explanation for that pattern. Several months after the

study was submitted, counsel for the government acknowledged that it then had "no explanation" for the results.⁴⁶

The United States does not question the materiality of the information sought in the discovery request, and raises no issue regarding the scope of that order. The government argued below that it would have been preferable for the district judge to subpoena information from California officials, rather than requiring the United States to produce documents or information. But this is precisely the sort of discovery management issue consigned to the discretion of the district courts.

ARGUMENT

Certain basic principles bearing on the instant appeal are not in dispute. "The decision to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" (U.S.Br. 17). The Solicitor General does not, of course, argue that discovery can never be ordered with regard to a claim of selective prosecution, and has not chosen to raise in this Court any question about the scope of the particular discovery ordered by the district court. The government appears to acknowledge that any limitations on discovery should "still allo[w] meritorious claims to proceed." (U.S.Br. 25-26) The parties are in agreement that here, as in any civil or criminal case, the decision of a district judge to order discovery may be overturned on appeal only if

⁴⁶ J.App. 150.

there has been a demonstrable abuse of discretion. (U.S.Br. 36-37).

The government, although opposing a discovery order directed to the United States, consistently maintained in the courts below that the district judge in this case *could* properly have issued a subpoena to California officials directing them to produce information about cocaine base dealers prosecuted in state court.⁴⁷ The United States also agrees that discovery may be ordered, either on a sufficient showing of dissimilar treatment of "similarly situated" individuals or where there are "direct admissions by officials of discriminatory purpose." (U.S.Br. 15). The question presented is whether these uncontroverted areas of judicial authority mark a rigid boundary beyond which district judges are powerless to inquire whether an investigation or prosecution was animated in whole or part by an unconstitutional purpose.

I. DEFENDANTS ARE ENTITLED TO DISCOVER EVIDENCE MATERIAL TO A DEFENSE OF SELECTIVE PROSECUTION

(1) This case concerns the scope of and procedure applicable to Rule 16(a)(1)(C) of the Federal Rules of

⁴⁷ Government Motion for Reconsideration of Order for Discovery, p. 14 ("information is . . . accessible to defendants by subpoena to local authorities"); J.App. 201 ("Defense Counsel . . . have as much opportunity as the Government possibly could to subpoena information from the state system"); Government Response to Petition for Rehearing and Suggestion for Rehearing *En Banc*, p.6 n. 4 ("defendants in this case could have pursued subpoenas to obtain state law enforcement records.")

Criminal Procedure. In terms modeled after Civil Rule 34(a), Rule 16 provides that a criminal defendant may inspect and copy any papers or documents "which are material to the preparation of the defendant's defense." Rule 16(a)(1)(C) does not require a defendant to obtain a court order in order to discover such material, but imposes on the government an obligation to "permit the defendant to inspect and copy" any documents within the scope of the Rule. The discovery request at issue in this case was expressly for "documentary evidence or information."⁴⁸

Provision for discovery of documents in criminal cases has existed since the initial promulgation of the Federal Rules of Criminal Procedure. The judicial practice of providing a defendant with access to documents prior to trial dates back to *United States v. Burr*, 25 Fed. Cas. 30 (1807) (Marshall, C.J.). The scope of Rule 16 has been repeatedly broadened because of the Advisory Committee's "view that an independent right of discovery for both the defendant and the government is likely to contribute to both effective and fair administration." (Notes of Advisory Committee to 1974 Amendments).

⁴⁸ A number of documents in the government's possession were obviously within the scope of the request. The actual indictments in federal crack cases would have identified the defendants in those cases; the race of a defendant is indicated in FBI arrest reports, Bureau of Prisons forms, and his or her NCIC Record of Arrests and Convictions, a normal component of the discovery provided by the government in any criminal case. The criteria utilized by the United States Attorney in selecting cases for federal prosecution are set out in a written guideline. See p.13, *supra*.

[A] system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases . . . is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system.

Wardius v. Oregon, 412 U.S. 470, 473-74 (1973). Rule 16 does not constrict the inherent authority of federal judges to order prosecutors to provide discovery or otherwise disclose information which justice requires be made available to a defendant. *Jencks v. United States*, 353 U.S. 657 (1957).

Rule 16(a)(1)(C) complements Rule 17(c), which authorizes a defendant to subpoena for presentation at either trial or a Rule 12(b) hearing books, papers or documents. Although the scope of the two rules is in some respects different, Rule 16 permits a defendant to examine and evaluate documents which he may then choose to subpoena. At a hearing on, for example, a claim of selective prosecution, a Rule 17 subpoena is available to obtain appropriate documents. Although Rule 17(c) contains no express requirement that documents be "material", the Rule's prohibition against "unreasonable" subpoenas is understood to encompass a requirement that the materials sought be "relevant". *United States v. Nixon*, 418 U.S. 683, 699-700 (1974).

The discovery authorized by Rule 16 would in certain instances be constitutionally required. *Brady v. Maryland*, 373 U.S. 83 (1963), mandates disclosure by the prosecution of "evidence favorable to an accused . . . that, if disclosed and used effectively, . . . may make the difference between conviction and acquittal." *United States v.*

Bagley, 473 U.S. 687, 676 (1985). Evidence which would lead a court to sustain a selective prosecution defense, thus preventing not only conviction but the risks of trial, obviously is exculpatory in nature. The government's disclosure obligation under *Brady* is greater when a defendant has made an express request for material. *Id.* at 681-82. The Compulsory Process Clause of the Sixth Amendment is generally available to provide "production of evidence needed . . . by the defense." *Taylor v. Illinois*, 484 U.S. 400, 409 (1988)⁴⁹. The inherent obligation of the federal courts to ensure that their actions and orders do not violate the Constitution encompasses the authority and at times an obligation to conduct a factual inquiry necessary to assure, for example, that a defendant has not been selected for prosecution or for imposition of a heavier punishment because of his race.

(2) Rule 16(a)(1)(C) is not, of course, a blanket authorization to defense counsel to browse through the files of the Department of Justice. The only documents which can be obtained are those "which are material to the preparation of the defendant's defense." Where defense counsel has reason to believe that a particular defense may be available to his or her client, Rule 16(a)(1)(C) is available to obtain relevant information in the hands of the government. But Rule 16 cannot be

⁴⁹ "This court would certainly be very unwilling to say that upon fair construction the constitutional . . . right to obtain its process, to compel the attendance of witnesses, does not extend to their bringing with them such papers as may be material in the defence." *United States v. Burr*, 25 Fed. Cas. 30, 35 (1807) (Marshall, C.J.).

utilized by defense counsel to rummage through government files on the off chance that some additional defense may turn up; such an inquiry would be the sort of fishing expedition prohibited by criminal and civil discovery principles alike. Discovery under Rule 16 is not permissible with regard to a defense which a defendant "has never alleged, much less claimed to have evidence tending to show" exists. *Wade v. United States*, 504 U.S. 181, 186 (1992).

The genuineness of a defense for which discovery is sought in a criminal proceeding can be assessed by the same objective standard utilized to determine the genuineness of other defenses or claims. The factual allegations underlying an asserted defense must "have evidentiary support or, if specifically so identified, [be] likely to have evidentiary support after a reasonable opportunity for . . . discovery." Rule 11(b)(2), Fed. Rules of Civ. Pro. Where the information already available to a defense attorney is "sufficient to lead a reasonable person to believe . . . that further inquiry on the subject is warranted" (Pet. App. 97a), discovery under Rule 16(a)(1)(C) is among the tools which, where otherwise appropriate, may be utilized to pursue that inquiry.

The government may resist any discovery request which it can show is no more than a fishing expedition. Where the United States declines on this basis to produce a document sought under Rule 16(a)(1)(C), a court called upon to resolve the ensuing discovery dispute can and should inquire whether the purported defense to which the document relates is a genuine one. In making that determination, a number of lower courts, and all members of the court below, have suggested with regard to a

selective prosecution defense that there must be a "colorable basis" for asserting that defense before discovery will be allowed. (Pet. App. 7, 19-21). The underlying question with regard to discovery regarding a selective prosecution defense is the same as for any other defense – whether the information available to defense counsel is sufficient to lead a reasonable attorney to conclude that further inquiry on the subject is warranted.

Even where a genuine defense is at issue, significant constraints may limit the scope, and even the availability of discovery. Any document sought must be "material" to the asserted defense. Under Rule 16, as with any discovery request, a court may consider whether the party seeking discovery already has reasonable access to the material at issue; the comparative accessibility of a document to the respective parties is of palpable importance. Rule 2 requires a federal judge to implement any discovery in a way that minimizes cost and delay, focusing discovery on those items most readily available and likely to lead most quickly to a resolution of the underlying defense.

In any case in which discovery is sought under Rule 16(a)(1)(C), the government may have a legitimate interest in protecting from disclosure some or all of the information in the documents in question. Even where that interest falls short of a legal privilege, see *Hickman v. Taylor*, 329 U.S. 495 (1947), this is a consideration which a court can and should consider in responding to discovery requests. In some instances, it may be appropriate to subject documents to a protective order, to provide only redacted copies of the documents, or for the district judge to review the materials in camera to ascertain what, if

anything, in them actually bears on the defense for which they are sought. Where a party seeking such sensitive discovery has not exhausted other sources of information, a district judge has discretion to deny discovery until the defendant has done so. In addressing such discovery issues, a district court should balance the importance of the government's legitimate need for confidentiality with the defendant's right to prepare and present a defense. See *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring); *Kerr v. United States District Court*, 426 U.S. 394, 405 (1976); *United States v. Nixon*, 418 U.S. 683, 711 (1974). One useful method of doing so may be by controlling the order in which discovery is permitted, initially allowing the form of discovery that is least burdensome, and evaluating the propriety of further discovery when the result of that first inquiry is known.

(3) Requests for discovery must ordinarily be addressed in the first instance by the district court. Where, after affording the parties a full and fair opportunity to be heard, the district judge fashions a practical solution to the discovery issues presented by a selective prosecution defense, several distinct considerations warrant considerable deference to that decision.

First, resolution of discovery issues "must necessarily be committed to the sound discretion of the trial court since the necessity for the [discovery] most often turns upon a determination of factual issues." *United States v. Nixon*, 418 U.S. 683, 702 (1974).

The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely

contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.

Anderson v. Bessemer City, 470 U.S. 564, 574 (1985). To the extent that a district court's decision turns on an assessment of the credibility of the prosecutor's explanation of his actions, its findings are entitled to particular deference. *Batson v. Kentucky*, 476 U.S. 79, 98 n. 21 (1986); see *Hernandez v. New York*, 500 U.S. 352, 364-66 (1991).

Second, the resolution of discovery issues often goes to the heart of a trial judge's responsibility under Rule 2 to manage the pretrial process with a minimum of cost and delay. "Discovery questions are ordinarily reviewed for abuse of discretion." *United States v. Bourgeois*, 964 F. 2d 935, 937 (9th Cir. 1992). These determinations often turn on intensely practical considerations, the interrelation of known and sought after information, the comparative accessibility of information to the various parties, and possible alternative methods of resolving a particular factual dispute. "The exact line between reasonableness and unreasonableness in each case must be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties." *Société Nat. Ind. Aéro. v. United States District Court*, 482 U.S. 522, 546 (1987).

Third, the issues raised by a claim of selective prosecution by a particular prosecutor's office will often be within the particular experience and expertise of a federal district judge who sits in the district at issue, and can draw on his or her "own day-to-day observations." *United States v. Redondo-Lemos*, 955 F. 2d 1296, 1302 (9th Cir. 1992).

District judges are uniquely situated to observe possible discrimination in the government's charging decisions. They have much more experience with the policies and practices of the United States Attorney in their district than do [appellate judges], and they are obviously in a better position to observe a pattern of discrimination than are individual defendants.

(Pet. App. 86a).

Fourth, a district judge will bring to a selective prosecution dispute an understanding of local circumstances that will at times be important to an evaluation of the competing arguments and evidence. In this Court, the government advances a necessarily generalized argument about whether it would be reasonable to assume that crack is sold in Los Angeles by non-blacks. (U.S.Br. 13-14, 29-30). A district judge who actually lives in Los Angeles, and is familiar with the patterns of drug use in that area, is far better situated to engage in an assessment of such arguments, involving as they do "a blend of history and an intensely local appraisal" of the issues. *White v. Regester*, 412 U.S. 755, 769 (1973).

II. NO SPECIAL STANDARDS ARE NECESSARY OR APPROPRIATE IN RESOLVING DISCOVERY REQUESTS RELATED TO, OR THE MERITS OF, A SELECTIVE PROSECUTION DEFENSE

A. General Discovery Principles Adequately Protect the Government from Improper Discovery

Not content with these general safeguards on the use of discovery in a criminal proceeding, the United States asks this Court to adopt a special, more stringent rule

applicable only to discovery related to selective prosecution issues. The sole practical effect of such a special rule would be to bar discovery in circumstances which otherwise satisfy the normal standards of materiality and reasonableness of scope.

The government's suggestion that this Court fashion such a special rule cannot be squared with the language of Rule 16. The arguments that the government advances for such a rule – delay, risk of abuse, potential intrusiveness – could be made to some degree with regard to any material sought by a criminal defendant. Rule 16 *does* impose special discovery limitations with regard to three specific types of evidence. First, Rule 16(a)(2) exempts from disclosure "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case." Second, Rule 16(a)(2) sharply limits the availability of "statements made by government witnesses or prospective government witnesses"; the timing and availability of that material is regulated with specificity by the Jencks Act. 18 U.S.C. § 3500. Third, Rule 16(a)(3) precludes discovery of grand jury records save in certain specified circumstances. Thus here, as in *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, ___, 113 S. Ct. 1160 (1993), "the Federal rules do address in Rule [16] the need for" limiting discovery of certain government materials, "but do not include among the enumerated [limitations] any reference to" evidence related to selective prosecution claims. 507 U.S. at ___, 113 S. Ct. at 1161. The lower courts have repeatedly and correctly rejected similar

efforts to engraft onto Rule 16 exceptions not explicitly contained in the language of that Rule.⁵⁰

The government urges this Court to hold that discovery in selective prosecution cases should be limited to "rare" circumstances. (U.S.Br. 26). The framers of the Rules of Criminal Procedure, however, knew how to craft such a discovery rule where they wished to do so; Rule 15(a) utilizes just such a standard in limiting depositions to "exceptional circumstances." No such restriction, however, is contained in Rule 16. "*Expression unius est exclusio alterius.*" *Leatherman*, 507 U.S. at ___, 113 S.Ct. at 1161. However persuasive the government's arguments might be if advanced in support of proposals to amend Rule 16, they are insufficient to explain why this Court should simply read into that Rule exceptions not found in its very specific language.

Although the substance of the government's proposed special standard is quite obscure, the United States clearly contemplates that, prior to any discovery regarding selective prosecution, there would in each case be an evidentiary hearing before the district court; at that hearing the defendant would put on evidence which the government would have an opportunity to rebut, and the court would then determine whether and what discovery

⁵⁰ *United States v. Scafe*, 822 F. 2d 928, 935 (10th Cir. 1987) ("The language of the rule reflects no intention that it be restricted to statements to be used in the government's case in chief and we reject that restrictive interpretation of the rule."); *United States v. Caldwell*, 543 F. 2d 1333, 1352-53 (D.C.Cir. 1974) ("we are unable to detect in this language [of Rule 16] the limitation the government suggests.")

should occur. Only if the defendant prevailed at this mini-trial of his selective prosecution claim would discovery be ordered by the district court. Cf. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). Precisely because Ninth Circuit caselaw embodies just such a rule, discovery regarding selective prosecution must in practice be initiated by motion; in the Central District of California it is only in civil cases that parties are required by the local rules to request and negotiate discovery issues before referring the matter to the district court.⁵¹ But this practice recreates the very process which the Rules were amended in 1974 to abolish, resort to the court in the first instance.⁵²

Although the United States is emphatic in arguing for a special discovery standard in selective prosecution cases, it is far from clear what that standard is, or in what cases the government intends its standard to lead to a result different than that which would ordinarily apply

⁵¹ Local Rules, C.D.Cal., Civ. Rule 7.15.

⁵² Prior to 1974 a defendant was required to obtain a court order in order to obtain discovery in a criminal case. In recommending a change in this awkward practice, the Advisory Committee explained: "The language of the rule is recast from the 'court may order' or 'the court shall order' to 'the government shall permit' or 'the defendant shall permit.' This is to make clear that discovery should be accomplished by the parties themselves, without the necessity of a court order unless there is dispute as to whether the matter is discoverable. . . ." The language of Rule 16 is in contrast with Civil Rule 35(a), which permits discovery of the physical or mental condition of an individual only by court order. *Schlagenhauf v. Holder*, 379 U.S. 104 (1965).

under Rule 16. The Solicitor General describes his proposal, variously, as a "substantial and concrete basis" (U.S.Br. 12, 19, 21, 25), "solid credible evidence" (*id.* at 12, 24), "reasonable likelihood" (*id.* at 25), "substantial threshold showing" (*id.* at 12, 20, 20 n. 1), "concrete" (*id.* at 21, 25, 29), "reasonable grounds" (*id.* at 26), and less than a *prima facie* case. *Id.* at 25. None of these alternative formulations seems likely to provide useful guidance to district judges faced with the eminently practical problems of supervising discovery, or to appellate courts asked to decide whether a district court abused its discretion. Rather, adoption by this Court of any of these vague admonitions would inevitably engender increased uncertainty and litigation regarding when discovery should and should not be permitted.

The government argues that without some special *per se* rule defendants raising selective prosecution claims would be able to "circumvent" the materiality requirement of Rule 16 (U.S.Br. 20 n.1), and would succeed in embarking on "needless" and "unwarranted" "fishing expedition[s]" leading to discovery of "irrelevant and immaterial" information. (U.S.Br. 12, 20, 25). But there is no reason to believe that district judges, who every day deal competently with discovery issues in civil as well as criminal cases, would somehow be incapable in selective prosecution claims of separating frivolous from legitimate discovery requests. Federal district courts have for decades been alert to the inappropriateness of unwarranted fishing expeditions; surely litigious anglers will not run amok merely by asserting a claim of selective prosecution. Doubtless there have been and will continue to be disputes under Rule 16 raising difficult factual and

practical issues, but the Rules clearly contemplate that those problems be addressed on a case by case basis.⁵³ The proposed *per se* prophylactic rule advocated by the government for an entire category of cases is inconsistent with the case specific determinations contemplated by Rule 16.

The government also argues that without a special discovery limitation there may be "abuses" (U.S.Br. 19), including "highly intrusive" (*id.* at 20) or "massive" (*id.* at 20 n. 1) discovery or discovery resulting in, or even intended to produce, unwarranted "delay". (U.S.Br. 17, 19, 20, 20 n.1, 25). Again, however, all of these are concerns that routinely arise with regard to any civil and criminal discovery; the government does not claim that such issues are more common or intractable when the evidence sought relates to selective prosecution. Here, as with any other claim or defense, the Court can ordinarily "be confident that the district court will not let discovery get out of hand." *United States v. Adams*, 870 F. 2d 1140, 1146 (6th Cir. 1989). In at least some circumstances, moreover, the discovery limitation proposed by the United States would increase rather than reduce delay. The United States, for example, maintains a computer list of all narcotics prosecutions in the Central District of California; the same information could be obtained by defense counsel by manually reviewing every criminal

⁵³ Rule 16(d)(1) provides in part: "Upon a sufficient showing the court may at any time order that the discovery . . . be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone."

file in the office of the District Court Clerk. To deny discovery of that computer list would obviously increase greatly the delay involved in resolving a selective prosecution claim.

The government offers no reason, moreover, why these concerns should result in the denial of discovery in *this* case. The Solicitor General has not challenged the scope of the particular discovery order in this case; he does not object that the particular information sought is excessive, irrelevant, unduly intrusive, or requested for purpose of delay. In the absence of any claim that the scope of the discovery ordered in this case is inappropriate, it makes little sense to suggest that that discovery order should nonetheless be overturned because of the possibility that discovery orders in some other case may be unduly burdensome or intrusive.

The Solicitor General urges this Court to forbid a federal judge, absent special circumstances, from raising on his or her own any questions, or seeking any information, about whether a criminal prosecution in his or her court has been undertaken for racial or other unconstitutional reasons. "[J]udicial inquiry into a prosecutor's reasons for bringing a prosecution should not even begin unless there is a substantial and concrete basis for suspecting unconstitutional action." (U.S.Br. 19). On the government's view, it would have been impermissible for the district judge in this case even to inquire of the attorney for the United States why the instant prosecution had been filed in federal rather than state court, or why there appeared to be few if any non-black defendants in federal cocaine base prosecutions. If the Solicitor General is correct, a United States Attorney could and perhaps should

flatly refuse to answer such a question, instead admonishing the judge that the government would respond only if the judge could first produce "substantial and concrete" evidence of prosecutorial misconduct. Such a rule could all too easily require a federal judge to be a witting participant in a serious constitutional violation.

Where, as here, the discretionary decision of a single government official may well result in defendants in their early 20's with minimal records and involvement spending 35 years to life in jail, such a bar to judicial scrutiny would confer on an Assistant United States Attorney a power not unlike the infamous lettres de cachet of eighteenth century France.⁵⁴ The broader interest of the United States, we urge, lies instead in ensuring compliance with the commands of the Constitution, even at the cost of some occasional inconvenience. Where a district judge entertains suspicion of invidious racial discrimination by the government, strict, not non-existent, judicial scrutiny is required. As Judge Kozinski observed:

Where a district judge detects what he suspects may be an error seriously affecting the rights of a criminal defendant, he *must* address the problem.

United States v. Redondo-Lemos, 955 F. 2d 1296, 1298 (9th Cir. 1992). The original panel decision below, on which the government otherwise relies, properly insisted that a federal judge could initiate an appropriate inquiry whenever "the district court develops a suspicion of unconstitutional conduct." (Pet. App. 74a).

⁵⁴ See J.App. 179, 182-83, 193.

The government suggests that discovery regarding selective prosecution claims should be severely limited because there is a presumption that federal officials do not violate the Constitution. (U.S.Br. 18-19). But "[i]t is appropriate to judge selective prosecution claims according to ordinary equal protection standards." *Wayte v. United States*, 470 U.S. 598, 608 (1985). No such constraint on discovery exists where a capital defendant asserts that a federal prosecutor exercised peremptories on the basis of race in a particular case. *Batson v. Kentucky*, 476 U.S. 79 (1986)⁵⁵ *Batson* expressly rejected the reasoning of *Swain* that a prosecutor might defend an equal protection claim merely by "relying on a presumption that he properly exercised the State's challenges." 476 U.S. at 91. It is undeniable that the government enjoys broad discretion in determining which prosecutions to bring, but the Solicitor General properly concedes that that discretion cannot be exercised on the basis of race. Judicial solicitude for legitimate exercises of that discretion cannot provide a basis for limiting inquiry into *whether* the exercise in a particular case was in fact an impermissible one.

In framing a particular discovery order, a district court can and should consider the degree to which its terms might inappropriately chill legitimate prosecutorial activity, just as a court would consider whether a grand jury subpoena might chill, for example, constitutionally protected free speech. *Herbert v. Lando*, 441 U.S. 153, 179

⁵⁵ See U.S.Br. 21 (claim of unconstitutional discrimination in refusal of prosecutor to file motion for reduced sentence "should be treated no differently from a prosecutor's other decisions.")

(1979) (Powell, J., concurring). But in this case the government did not argue below, and does not insist here, that the particular discovery order at issue presents such a threat. Indeed, the government insisted below that most of the information sought was already a matter of public record. Only evidence that a particular request is likely to have a chilling effect, not a "generalized claim of confidentiality", is sufficient to raise questions about the appropriateness of a particular discovery order. *United States v. Nixon*, 418 U.S. 683, 711, 713 (1974). The government represented to the court below that it would probably open a *criminal* investigation if there were "the slightest indication that a[n Assistant U.S. Attorney] in our office, or an agent or officer with whom we were dealing, had charged a case, or prosecuted a case, or arrested an individual for racial reasons."⁵⁶ In cases in which government officials already face a threat of criminal prosecution, the possibility of disclosure of information in a collateral criminal case is unlikely to have even a marginal additional chilling effect.

The Solicitor General suggests that special limitations on discovery related to selective prosecution is needed to avoid, save in "rare" cases, disclosure of evidence in the possession of the government which may bear on such claims. (U.S.Br. 26) In the lower courts, however, it is the frequent practice of the United States to oppose discovery motions by selectively disclosing to the court, on its own initiative, government evidence which the United States Attorney believes likely to persuade the court to deny the

⁵⁶ J.App. 197.

motion⁵⁷. In the instant case, for example, the government proffered declarations about the charging decision in this case, a documentary analysis of narcotics use and sales, and a lengthy list of federal narcotics prosecutions, in a candid effort to "short circui[t] the discovery issue."⁵⁸ The United States offered similarly selected evidence in *Wayte v. United States*, 470 U.S. 598, 504 (1985). Thus the practical question raised by these cases is not whether the government can shield *all* its information from discovery, but whether it can defeat a discovery request by selectively disclosing to the court only the evidence which tends to show that discovery is not appropriate. In some cases, of course, the court may find that showing persuasive, but in other instances a court might sensibly be induced to order discovery because of the nature of the information the government had chosen to withhold, or because of the unpersuasiveness of what may well have been the government's best evidence. In general, "more accurate results will be obtained by placing all, rather than part, of the evidence before the decision maker." *Herbert v. Lando*, 441 U.S. 153, 173 (1979).

We do not question the earnestness of the government's concern that excessive and unwarranted discovery could impose "high costs on the criminal justice system".

⁵⁷ E.g., *United States v. Gomez-Lopez*, 62 F. 3d 304, 305 (9th Cir. 1995); *United States v. Fares*, 978 F. 2d 52, 58 (2d Cir. 1992); *United States v. Bourgeois*, 964 F. 2d 935, 940 (9th Cir. 1992); *United States v. Penagaricano-Soler*, 911 F. 2d 833, 836-37 (1st Cir. 1990); *United States v. Aguilar*, 883 F. 2d 662, 708 (9th Cir. 1989); *United States v. Greenwood*, 796 F. 2d 49, 52 (4th Cir. 1986); *United States v. Holmes*, 794 F. 2d 345, 348 and n. 3 (8th Cir. 1986).

⁵⁸ J.App. 172.

(U.S.Br. 17) But "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts. . . ." *United States v. Nixon*, 418 U.S. 683, 709 (1974). The Solicitor General properly recognized a decade ago that

[n]othing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's exercise of his constitutional rights, as the basis for determining its applicability.⁵⁹

"In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law", *Batson v. Kentucky*, 476 U.S. at 99, are imperiled by the appearance of racial discrimination in that system.⁶⁰ In the United States today public confidence in the racial fairness of the criminal justice system is already badly shaken; in Los Angeles that confidence has virtually collapsed. When a large portion of the population believes that system is seriously tainted by racial discrimination, the public cooperation on which the system depends - from witnesses as well as jurors - is at risk. The facts which prompted the instant discovery request -

⁵⁹ Brief for United States, *Wayte v. United States*, No. 83-1292, p. 22 (quoting *United States v. Berrios*, 501 F. 2d 1207, 1209 (2d Cir. 1974)).

⁶⁰ "Everyone concerned with the legitimacy of the criminal justice system - and with the willingness of all citizens to accept its judgment as fair and final - must be troubled by allegations of unfairness, particularly racial discrimination." U.S. Sentencing Commission, *Materials Concerning Sentencing for Crack Cocaine Offenses*, 57 Crim. Law. Rep. 2127, 2131 (May 31, 1995).

that all or virtually all defendants prosecuted for cocaine base sales by federal authorities are black – is not some state secret; a randomly selected pedestrian at the corner of Florence and Normandie in South Central Los Angeles could have accurately predicted the result of the Federal Public Defender's study. The continued resistance of the Department of Justice to full and fair discovery and public hearing on such issues will in the long term impose on the criminal justice system a cost immeasurably greater than the passing inconvenience of responding to a discovery request.

B. Proof of the Existence of "Similarly Situated" Non-Minorities Is Not a Necessary Element of a Selective Prosecution Defense

(1) The criminal justice system, necessarily and properly, is permeated by circumstances affording, and often requiring, law enforcement officials to make choices. The police officer walking a beat decides daily what infractions to pursue, and which in prudence should be overlooked. Federal or state task forces select particular geographic neighborhoods to target for investigation. Authorities may focus on particularly visible criminal activity, or pursue covert but possibly more far reaching conspiracies. Officials who come across a drug dealer may opt for an immediate arrest, or try to arrange for larger sales which will lead to far increased penalties. Where, as is often the case, the same criminal act violates both federal and state laws, federal officials must select those defendants against whom federal charges will be filed, and which suspects should be left to state authorities. All of these selections, if properly made, may

enhance the overall effectiveness of law enforcement; but any of these decisions, if made on the basis of race, would be unconstitutional.

One manner in which law enforcement officials could discriminate would be by making improper distinctions among defendants with identical criminal histories who had committed the very same crime. Thus Equal Protection would clearly be violated if the government were, for racial reasons, to target or prosecute blacks who sold more than 50 grams of crack, while ignoring whites who sold the same quantity of the same drug. E.g., *United States v. Gutierrez*, 990 F. 2d 472, 477 (9th Cir. 1993) (claim that government intentionally "targeted predominantly black and hispanic neighborhoods.")⁶¹ But clearly that is not the *only* method in which invidious discrimination can occur. If in a particular locality cocaine base were actually used and sold only by blacks, while cocaine powder were used and sold only by whites, the Constitution would certainly be violated if the government, for racial reasons, prosecuted even low level crack dealers but only major powder distributors, chose to target its investigations at crack violations, or made a greater effort to induce crack dealers to sell large quantities to federal agents. Equal protection principles preclude the government from targeting a particular type of criminal act for greater scrutiny, harsher penalties, or more vigorous prosecution *because* most or all of the individuals who

⁶¹ See *United States v. Bishop*, 959 F. 2d 820, 825-26 (9th Cir. 1992) (equal protection violated by peremptory challenge based on ethnic composition of neighborhood in which prospective juror resides).

commit that offense are racial minorities. See *Hunter v. Underwood*, 471 U.S. 222, 226-32 (1985).

As these examples illustrate, unconstitutional discrimination can certainly occur even though all the individuals who violate a particular statute, or who do so in a particular manner, may belong to a single racial or ethnic group. Even if Christopher Lee Armstrong were the only person ever suspected of selling crack in the Central District of California, federal officials would undeniably violate the Constitution if they targeted, investigated, arrested, or selected him for prosecution because he was black or Catholic or a Republican.

(2) The government suggests that the existence of "similarly situated" whites is a necessary element of a selective prosecution claim. This argument erroneously confuses one possible method of *proving* intentional discrimination with the nature of intentional discrimination itself.

As this Court has repeatedly held, what equal protection prohibits, absent a compelling governmental interest, is governmental action taken on the basis of race. *Washington v. Davis*, 426 U.S. 229 (1976). The pivotal issue in such a discrimination case is the motive of government official or officials involved. Often, of course, one of the most useful evidentiary tools for discerning motive is a comparison of the treatment of similarly situated minority and non-minority individuals. Thus, where voting officials apply a literacy test with draconian harshness to black citizens, rejecting even those with college degrees, while happily registering comparable or even less educated whites, the invidious motive at work will be

entirely obvious. *Louisiana v. United States*, 380 U.S. 145, 153 (1965). But that assuredly is not the only type or method of proving discrimination. The Constitution forbids a state registrar from rejecting even a single black registrant on the basis of race, even if his or her particular background be totally unique, or from adopting a particular racially neutral practice because, even though applied equally to "similarly situated" blacks and whites, it would fall more harshly on racial minorities. *Hunter v. Underwood*; *Harman v. Forssenius*, 380 U.S. 528, 543-44 (1965).

This distinction is a familiar one in employment discrimination litigation. Federal anti-discrimination laws forbid employers to discharge an employee because of his or her race. Where a discharged employee contends that he or she was the victim of unlawful discrimination, one method of establishing that claim would be to show that another employee, of a different race, was treated more leniently despite having committed the identical offense. See, e.g., *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 275, 278 (1976). But federal law also protects from race-based dismissals workers whose positions, circumstances or alleged transgressions happen to be unique. See, e.g., *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). Similarly, under *Batson v. Kentucky*, 476 U.S. 79 (1986), a defendant need not show that a prospective juror allegedly removed on the basis of race was "similarly situated" to some white juror; the background and circumstances of individual jurors is almost always to some extent unique.

It would, of course, be possible to frame a law which expressly permitted intentional discrimination in the

absence of "similarly situated" comparators. The Equal Pay Act is just such a statute, prohibiting gender based wage discrimination against women only where there are men performing for higher wages "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1) (Emphasis added). Thus where only women work in "a unique position", the Equal Pay Act does not prohibit an employer from setting a low wage for that position because it harbors animus towards female workers. *County of Washington v. Gunther*, 452 U.S. 161, 179 (1981). Even in the absence of any similarly situated men, however, that same act would violate Title VII, whose prohibition against intentional discrimination, like the Constitution, contains no such limitation. *Id.*

Adoption of the government's proposed rule would lead at times to incongruous results. If, for example, a prosecutor adopted a racially motivated practice of prosecuting even small time non-white drug dealers, while charging only those whites who were major dealers, whether the conviction of a particular small time non-white dealer was unconstitutional would depend on what types of drugs happened to be sold by whites in the area. Thus, the convictions of minority powder cocaine or methamphetamine dealers might be invalid, while the convictions of minority crack or black tar heroin dealers would be perfectly constitutional. See *County of Washington v. Gunther*, 452 U.S. at 179.

This Court has previously rejected the United States' suggestion that the selective prosecution defense be limited to cases in which there were "similarly situated"

individuals receiving more lenient treatment. In *Wayte v. United States*, 470 U.S. 598 (1985), the lower courts had imposed on selective prosecution defenses a two-part standard, requiring both proof of an unconstitutional animus and proof that there were others "similarly situated" who had not been prosecuted. 470 U.S. at 605-606. The Solicitor General urged this Court in *Wayte* to adopt that same special standard⁶². This Court refused to do so, instead utilizing the requirement of "ordinary equal protection standards" which require a defendant to show "a discriminatory effect and . . . a discriminatory purpose." 470 U.S. at 608. This Court's rejection of the proposed requirement of differing treatment of "others similarly situated," in favor of a broader standard of "discriminatory effect," reflected an understanding that discrimination might occur against an individual or group of individuals whose particular situations were not similar to anyone else's.

This Court's decision in *Ah Sin v. Wittman*, 198 U.S. 500 (1905), does not support the government's position. The petition for writ of habeas corpus in that case contained no allegation of *any* invidious motive on the part of local officials, nor any claim that the statute at issue

⁶² Brief for the United States, No. 83-1292, pp. 23-29.

The government urged this Court to hold that proof of similarly situated unprosecuted individuals was an essential "prong" of a selective prosecution claim, *id.* at 26, and that absent proof of that prong it would be improper for a court even to inquire whether a particular prosecution was the product of an invidious motivation. *Id.* at 26.

was adopted⁶³, enforced, or enforced with particular vigor because those likely to violate the law were primarily Chinese. The sole allegation of the petition – that Chinese persons alone had been prosecuted under the ordinance – asserted neither the existence of a discriminatory purpose nor the existence of a discriminatory effect. Applying a stringent pleading requirement quite unlike the standards subsequently adopted by the Federal Rules, this Court in 1905 held that that single allegation was insufficient. 198 U.S. at 507-08. Although *Ah Sin* indicated the petition would have been sufficient if it had also contained an allegation that there were non-Chinese offenders who went unprosecuted, the Court did not suggest that this was the only additional allegation which would have remedied the defect in that pleading.⁶⁴

(3) To the extent that a defendant argues that improper invidious distinctions were made within a particular group of offenders, such as crack dealers, the comparative treatment of other members of that group

⁶³ At the time *Ah Sin* was decided, the decisions of this Court precluded *Ah Sin* from advancing any challenge to the purpose of the law at issue. See *Palmer v. Thompson*, 403 U.S. 217 (1971); *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *McCray v. United States*, 195 U.S. 27, 56 (1904).

⁶⁴ The ordinance in *Ah Sin* in essence forbade the possession of cards, dice or dominoes behind locked doors. It is entirely inconceivable that no white persons engaged in such behavior in the rambunctious society of turn of the century San Francisco. Were the government today to attack the sufficiency of a pleading by hypothesizing the possibility of such white fastidiousness in the aptly labeled Wild West, that argument would be dismissed as an "ingenious academic exercise in the conceivable." *Warth v. Seldin*, 422 U.S. 490, 509 (1975).

would of course be important evidence. A district court clearly should consider that element in resolving this type of selective prosecution defense on the merits, and undeniably could do so in deciding whether to order discovery. The government urges this Court to go further and announce a rigid rule that discovery cannot be ordered in such a case unless there is either substantial evidence as to the composition of the group of violators not prosecuted, or a confession by the United States Attorney that the prosecution decision was the result of invidious discrimination. (U.S.Br. 15). In the latter case, of course, there would be no need for discovery; such a confession alone would require dismissal of the improperly motivated charges. No basis exists for imposing the former requirement as a per se condition of discovery in every case, regardless of its circumstances.

The Solicitor General insists that this requirement imposes no significant barrier to any meritorious claim because detailed data about offenders not prosecuted by the United States is always "readily accessible to the public." (U.S.Br. 35; see also *id.* at 15, 25-26)⁶⁵. In any

⁶⁵ In 1985 the Solicitor General made a similar argument in urging this Court to adhere to the harsh rule of *Swain v. Alabama*. "We are unpersuaded that *Swain* imposes an unduly difficult burden on defendants seeking to prove systemic exclusion. If the pernicious practice of racially-motivated exclusion in fact prevails . . . defense counsel could relatively easily keep the records necessary to make the required proof. . . . There are cases in which such statistics have been collected and produced . . . [Defense attorneys] are well situated to collect the requisite statistics." Brief for United States as Amicus Curiae, *Batson v. Kentucky*, No. 84-6263, pp. 6, 26-27. In *Batson*, this Court concluded, to the contrary, that *Swain* had established a

individual case in which such information was actually readily available to a defendant, the United States would have no need for the proposed *per se* rule, since the government could on that basis urge the district court to defer discovery in that particular case until the information had been brought forward by the defendant. The Solicitor General asks this Court to adopt *a priori* an irrebuttable presumption that such information will be available in *every* case; the primary impact of such a rule, of course, will be in precisely those cases in which the presumption is *incorrect*, and in which the presumption would operate to preclude a defendant with a possibly meritorious case from showing that in his or her case, contrary to the Solicitor General's somewhat breezy assumption, the information in question was in fact difficult or impossible to obtain⁶⁶.

The instant case presents just such a situation. In the district court respondents made a persuasive showing that information about state prosecutions, or about the

crippling standard of proof, and *Swain* had as a consequence been understood in practice to sanction intentional discrimination on the basis of race.

⁶⁶ Requiring defendants in such cases to adduce, without the aid of discovery, statistically persuasive evidence that similarly situated whites had not been prosecuted would create the sort of "crippling burden of proof" established under *Swain v. Alabama*, 380 U.S. 202 (1965), and rejected by this Court in *Batson*. *Batson* noted that, despite the availability of discovery under *Swain*, requiring a defendant to investigate the circumstances of a substantial number of other cases could create very real "practical difficulties", and that "the burden would be insurmountable" if available government files did not contain racial identifications. 479 U.S. at 92 n.17.

race of federal or state defendants, could not readily be obtained.⁶⁷ Respondents' discovery requests were therefore expressly framed to obtain from the United States whatever information or documents it had regarding the race of state defendants or crack distributors in general. The United States did not seriously dispute that factual contention in the district court, and does not address here the fact-specific arguments made below. Instead, the Solicitor General urges this Court to hold that it is somehow impossible that comparative information would ever be difficult to obtain in the Central District of California or anywhere else in the nation, and that it therefore would be unnecessary and improper for a district judge ever to consider evidence intended to demonstrate the existence of a problem which, the government urges, could not possibly arise.

If, of course, comparative information were in fact always readily available, it would be of little consequence if the courts were to adopt such a conclusive presumption of availability, and then place on the United States, rather than on the defendant, the nominal burden of bringing that evidence into court. That is precisely the result of the holding of the en banc court below that all races will be presumed to commit any particular offense unless the government adduces evidence to the contrary. (Pet. App.

⁶⁷ "[S]ince the pertinent records relating to cases in the geographical area covered by the Central District may well be scattered across seven different county district attorney's offices, seven separate sheriff's departments, and a large number of independent local police departments, the defendants would have an almost impossible time compiling data on their own." Pet. App. 101a n. 6.

19a). If such information were readily obtainable, the Department of Justice would presumably welcome an invitation to bring forward evidence which might strongly support its position. Instead of blithely accepting a requirement that it produce this allegedly "readily available" information, however, the government warns that the burden – nominal when imposed on an indigent individual defendant – would cause horrific problems when imposed on the Department of Justice. *See* U.S. Br. 19-20, 35, Pet. App. 17, 23 n.3, 24, 26.

In reality, of course, the availability of data on the group of non-prosecuted offenders will vary from case to case; more importantly, so will the comparative ability of the United States Attorney and defense counsel to obtain the information. The direction of Rule 2 that Rules of Criminal Procedure be construed to avoid "unjustifiable expense and delay" admonishes trial judges to place the burden of producing such relevant information on the party able to do so with the least cost and delay. That admonition is particularly important where, as the district judge noted, the federal government will foot the bill either way, paying for the time of either the United States Attorney, the Federal Public Defender, or, at a far higher hourly rate, private counsel appointed to represent indigent defendants.⁶⁸ Where, for example, the United States has computer data available at the touch of a keyboard, no district judge would require – as would the government's proposed rule – that defense counsel recompile the same data by hand.⁶⁹ The government conceded in

⁶⁸ J.App. 189-90.

⁶⁹ "[N]early all of the data necessary to a showing of selective prosecution are far less accessible to the defendants than to

the court of appeals that "certain law enforcement data is undoubtedly more accessible to the government"⁷⁰; "most of the relevant proof in selective prosecution cases will normally be in the Government's hands." *United States v. Heidecke*, 900 F. 2d 1155, 1158 (7th Cir. 1990).⁷¹

The absence of comparative data is, of course, one of the factors which a court could consider in determining whether to permit discovery. The government concedes that discovery could in at least some circumstances be ordered without such evidence – whenever the United States Attorney confessed in court that he had sought a harsher penalty on account of race, a confession that might entail potential criminal

the federal government. Federal and county law enforcement authorities cooperate closely in these cases, and both levels of government are involved in the decision whether to bring charges in federal or state court. . . . Given that the federal and local authorities work so closely investigating these crimes, the federal government probably already has records of the cases in which it declined to initiate federal prosecution. In any event, it is surely much easier for the United States Attorney's office to get this information from state officials, from the county prosecutor's offices, and from local police departments, than it is for criminal defense lawyers." J.App. 100a-101a, n. 6.

⁷⁰ Government's Response to Petition for Rehearing and Suggestion for Rehearing *En Banc*, p. 6 n.4.

⁷¹ That defendants will often face difficulty in proving systemic discrimination by a prosecutor was explained by Justice Goldberg. "[The prosecution is] in the better position to develop the facts. The defendant is a party to one proceeding only, and his access to relevant evidence is obviously limited. The State is a party to all criminal cases and has greater access to the evidence. . . ." *Swain v. Alabama*, 380 U.S. 202, 240 (1965) (dissenting opinion).

liability. There is, however, no reason to insist that a colorable showing of materiality be made in this or any other particular manner. On the government's view, where a written confession of just such an unconstitutional purpose was in the United States Attorney's files, but no comparative data could be obtained by the defendant, a district court would be powerless to order disclosure of that very confession.

In the intensely practical task of managing discovery, district judges must be accorded considerable discretion to decide in what direction discovery would most effectively proceed. The government proposes that in every selective prosecution case a defendant must first address any relevant issue about similarly situated offenders, and in doing so may resort to subpoenas of state information, but not to discovery of federal information. Surely, however, where the United States has the same information as state authorities, a district judge could and ordinarily should direct the United States to produce it, if only because the United States, and not the state, is a party to the proceeding. Regardless of the location of such comparative data, a district judge might sensibly choose to focus discovery on other issues where the information was more accessible or more likely to be dispositive.

C. No Special Heightened Standard of Proof Should Be Applied to a Defense Based on Racial Discrimination by Prosecutors or Other Law Enforcement Officials

The government urges this Court to hold that where a defendant asserts that he was selected for prosecution on account of his race, or for some other constitutionally

impermissible reason, the defendant can only prevail by establishing that factual assertion with "exceptionally clear proof." (U.S.Br. 18). At this point in the instant case, of course, consideration of that issue would be premature. The district court has not reached the merits of respondents' claims, or even scheduled a hearing on them. Questions regarding the quantum of proof necessary to establish a selective prosecution claim cannot fairly be said to be encompassed by the Question Presented regarding discovery.

This Court's decision in *Wayte v. United States*, 470 U.S. 598 (1985) is dispositive of the government's contention. *Wayte* makes clear that "[i]t is appropriate to judge selective prosecution claims according to ordinary equal protection standards." 470 U.S. at 608. In an ordinary equal protection case a plaintiff alleging intentional racial discrimination need only demonstrate that fact by a preponderance of the evidence. In assessing the selective prosecution claim in *Wayte*, the Court applied equal protection decisions concerning employment discrimination, 470 U.S. at 608-09 (citing *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979) and *Washington v. Davis*, 426 U.S. 229 (1976)), housing discrimination, 470 U.S. at 609 (citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)), and jury discrimination. 470 U.S. at 608-09 (citing *Castaneda v. Partida*, 430 U.S. 482 (1977).)

The exercise of peremptory challenges by a prosecutor, like decisions to initiate a prosecution, involves a substantial degree of discretion, yet this Court has applied ordinary standards of proof in evaluating claims that a prosecutor utilized a peremptory challenge to

exclude a prospective juror on the basis of race. In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court overturned *Swain v. Alabama*, 380 U.S. 202 (1965), because the special stringent evidentiary requirements of *Swain* were "inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." 476 U.S. at 93. In delineating the standard of proof applicable to a prosecutor's use of peremptory challenges, *Batson*, like *Wayte*, relied on Equal Protection decisions related to discrimination in employment, housing, and jury selection, as well as Title VII case law. 476 U.S. at 93-95 and n. 18. Similarly, no special standard of proof is applied in evaluating a claim that a prosecutor vindictively increased the charges against a defendant in retaliation for the exercise of some constitutional right. *United States v. Goodwin*, 457 U.S. 368, 380 n. 12 (1982).

The reference in *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987), to a need for "exceptionally clear proof" is easily distinguishable from the instant case. First, many of the decisions at issue in *McCleskey* had been made by jurors, whom it was impracticable to question about their motives, and the questioning of whom has traditionally been presumed inappropriate absent quite extraordinary circumstances. Prosecutors, on the other hand, are routinely asked by courts to explain their actions, e.g. *Batson*, and here, as in other cases, the government has volunteered explanations for its actions, resisting only discovery which might tend to undermine those explanations. Second, the patterns evident in *McCleskey* involved literally thousands of jurors over a period of years scattered

across an entire state, individuals who could not conceivably have acted with in consultation or with a conscious common plan. A claim of selective prosecution, on the other hand, like a claim of systematic discrimination under *Swain v. Alabama*, involves at most a far more limited number of prosecutors, all working for the same agency and presumably responsive to similar pressures and incentives.

III. THE DISTRICT JUDGE DID NOT ABUSE HER DISCRETION IN ORDERING THE LIMITED DISCOVERY IN THIS CASE

This case palpably presents the type of circumstances in which a district judge has the discretion to order an appropriate form of discovery.

The government did not contend below, and does not argue here, that the discovery request initiated by the Federal Public Defender was a mere fishing expedition. The fact that *all* crack cases closed by that office for an entire year involved black defendants provided counsel for respondents with a colorable basis for believing that a selective prosecution defense would be available, and assuredly warranted further inquiry. It is difficult to see how a responsible defense attorney would have failed to do so. While subsequent discovery and litigation will undoubtedly throw more light on this singular circumstance, the United States does not contend that there was some innocent explanation so obvious to all that counsel for respondents could not seriously have believed that discrimination might be at work. On the contrary, almost two months after respondents presented this study along

with their motion for discovery, the Assistant United States Attorney responding to the motion confessed that he still had "no explanation" for the facts which it revealed. (J.App. 150).

Neither does the Solicitor General suggest that, once counsel for respondents had seen the material offered by the government in its motion for reconsideration, the only reasonable conclusion they could have drawn was that there was no longer any colorable basis for pursuing a selective prosecution defense. To the extent that the government was arguing that virtually all crack dealers in the area were black, the personal experience of one of respondents' attorneys was to the contrary. Although the government proffered declarations from two law enforcement officials denying any racial motive, prior filings in this case raised serious questions about the reliability of both officials.

The United States does not suggest that the type of discovery sought below was not material to respondents' selective prosecution claim. On the contrary, both in the courts below and in this Court the government's arguments have focused on the very type of information which respondents sought to obtain through discovery. In this Court the Solicitor General stresses the importance of evidence concerning non-blacks prosecuted in state courts in the Central District of California; that was one of the very items of information sought by the discovery request. The government relies on its own undeniably anecdotal information about the race of federal crack defendants, and suggests the scope of the Federal Public Defender's presentation was too limited (U.S.Br. 27, 32

n.3); production of documents providing more comprehensive information about these very issues was one of the central purposes of the requested discovery. The United States obviously does not dispute the relevance of its own purported selection criteria to a determination of whether the decision to prosecute respondents had a non-racial basis.

The district judge properly considered the comparative ability of the parties to obtain information of obvious relevance, and assessed the relative costs involved. (J.App. 189-90). In this Court, the Solicitor General argues repeatedly, albeit without explanation, that respondents had ready access to information about the number and racial distribution of crack defendants in state court. (U.S.Br. 26, 35). But that is the very factual argument which three years ago was made by the United States Attorney and rejected by the district court. The government makes no assertion that the lower court's finding on this issue was clear error.

The trial judge's familiarity with local circumstances, and her 12 years on the federal bench, were of obvious importance in evaluating the material submitted by the United States Attorney and relied on in this Court by the government. The lead police and ATF investigators, for example, insisted that they had no idea of the race of the individuals involved when they began their investigation of a suspected crack ring in Inglewood; any judge in Los Angeles, however, would understand that law enforcement officials would know full well that an investigation targeted at Inglewood, rather, for example, than at the hispanic community in Van Nuys, or the white suburb of Simi Valley, would lead to the arrest of black suspects.

The government suggests that the pattern of federal prosecutions could be explained by considering the weight of the narcotics which a suspect was charged with distributing. (U.S.Br. 35-36 n.4). But a federal judge sitting in the Central District of California has substantial first hand experience, which appellate judges would not, with which to evaluate such a claim, drawing, for example, on her knowledge of the comparative size of the sales with which black crack dealers and white powder cocaine dealers were being charged in that federal court.

The primary thrust of the government's argument in this Court is that respondents did not properly compare the pattern of federal prosecutions with the treatment of "similarly situated" non-blacks. But over the course of this litigation the government has had a series of quite different positions as to which other offenders should be regarded as "similarly situated." In August, 1992, the government filed a memorandum insisting the proper comparison group was non-black cocaine base dealers.⁷² A month later, the government filed a second memorandum insisting, to the contrary, that "the proper universe of similarly situated defendants in this case is all narcotics offenders indicted under 21 U.S.C. § 841 and 846."⁷³ In the Ninth Circuit, the government suggested to

⁷² Government's Opposition to Defendants' Motions for Discovery, p. 6.

⁷³ Government's Motion for Reconsideration of Order for Discovery, p. 10. The government also argued, "In contrast, defendants have asked this Court to adopt an overly narrow definition of similarly situated law breakers to be crack cocaine offenders, rather than the appropriate universe of all federal narcotics offenders in that same time period." *Id.*

the original panel that "the proper universe of similarly situated defendants" was "[g]enerally all those offenders that have violated the same criminal statute . . . all federal narcotics offenders indicted under 21 U.S.C. §§ 841 and 846."⁷⁴ In its brief to the en banc court, however, the government asserted that a "similarly situated individual" would be one "with a similar criminal background and similar offense conduct."⁷⁵ In this Court, the government advances three alternative definitions of "similarly situated": (a) individuals "eligible for prosecution" (U.S.Br. 14, 32, 37) (b) persons guilty of "dealing in crack" (U.S.Br. 30) and (c) persons who distribute "more than 50 grams of cocaine and . . . use . . . firearms." (U.S.Br. 35-36 n.4). The district court cannot fairly be faulted for declining to address, as a precondition of any discovery, a fact-bound issue regarding which the government's own position continues to evolve, or for failing to require respondents to present in 1992 a study that took into consideration "criteria" yet to be delineated.

The record, of course, does contain declarations indicating that there are indeed a substantial number of non-black crack dealers. The government asserts without explanation that the district court did not rely on this information. (U.S.Br. 28 n.2). The government, however, made no such assertion in the court of appeals, and the panel decision held that the district judge had relied on this evidence. (Pet. App. 82a-83a). In her January 5, 1993, bench opinion, the district judge stressed that she had

⁷⁴ Brief for Plaintiff-Appellant, p. 16 n. 7.

⁷⁵ Appellant's En Banc Brief, p. 6.

"reviewed all of the evidence offered by all parties"⁷⁶, and singled out only another item of evidence offered by respondents as not persuasive.⁷⁷ The government also contends that the court of appeals did not base its ruling on this evidence (Reply Brief for the United States, 4 n. 1); in fact the en banc court expressly relied on that evidence. (Pet. App. 22a-23a, 30a).⁷⁸

⁷⁶ J.App. 218.

⁷⁷ *Id.*

⁷⁸ The government also argues that this evidence is insufficient to provide a basis for the discovery order, criticizing it as "vague, conclusory, and impressionistic hearsay." (U.S.Br. 35 n. 4). This fact-bound evidentiary issue is not fairly encompassed by the Question Presented.

The government advanced no objection to the form or sufficiency of this evidence when it was offered in the district court, and it is thus precluded from raising such objections on appeal. (Pet. App. 98a-99a and n.5). The Reed declaration was based in part on personal experience on the bar referral panel which provided counsel for indigent state defendants. (J.App. 140-41). In this Court, on the other hand, the government invokes an affidavit of the DEA Public Information Officer that is to a substantial degree hearsay. (J.App. 71-74) ("My knowledge is based upon numerous reports and publications . . . and attending various seminars, meetings, lectures, and conventions.")

United States Dep't of Labor v. Triplett, 494 U.S. 715 (1990), does not limit the type of evidence on which a district court can rely in exercising its discretion to order discovery. *Triplett* concerned the quantum of evidence necessary to warrant a determination that a nation-wide administrative system mandated by Congress is unconstitutional. Far from attacking the constitutionality of any federal statute, respondents seek to enforce the prohibitions against discrimination in punishment embodied in 18 U.S.C. § 242 and 28 U.S.C. § 994(d). The instant appeal concerns only the practices of a particular United States Attorney's office, and will resolve, not the merits of a constitutional

The government suggests, in the alternative, that respondents should have introduced a study that took into consideration whether non-black narcotics defendants had distributed more than 50 grams of crack or had used guns. But a central purpose of the discovery request and order in this case was to obtain from the government an official articulation of its prosecution criteria, against which the government's actions could be assessed. It makes no sense to require respondents, as a condition of obtaining that discovery, to guess in advance what criteria the government would announce years later on appeal, or to conduct a study based on the very sort of information which respondents needed discovery to obtain. The government does not even suggest that the information necessary to prepare this sort of proposed study, such as data on the quantity of narcotics distributed by state and federal defendants, was in any way available to respondents.

CONCLUSION

This case arises out of the decision of a responsible and experienced federal judge to permit a limited inquiry into a single claim of racial discrimination in the criminal justice system. That the order in question was issued by the United States District Court in Los Angeles is neither unimportant nor necessarily coincidental. Elimination of

claim, but merely the availability of discovery that bears on that claim. Respondents seek discovery for the very purpose of obtaining more "solid and credible evidence" to sustain that defense.

racial discrimination from the criminal justice system is the overarching equal protection problem of our time, as deeply harmful and frustratingly intractable today as was school segregation four decades ago. This appeal on its face concerns seemingly pedestrian issues of discovery and standards of proof. But as the sorry history of *Swain v. Alabama* well illustrates, there comes a point at which a concatenation of technicalities can vitiate the constitutional promise of equal protection of the law.

The Constitution confers upon federal judges a pivotal role in the process of eradicating discrimination root and branch both from the practices of government parties and from their own courtrooms. Implementation of the non-discrimination principle often turns less on abstract legal doctrine than on the perspicacity and practical judgment of district judges sensitive to the intricacies of local practices and realities. In the instant case Judge Marshall has taken only a modest step, foreswearing any preconceptions about the merits of the discrimination claim, asking only for a full explanation of the type of pattern that is deeply troubling to the American people. That action warrants not reversal but commendation by this Court.

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

1. *United States v. Washington*, CR 91-632-TJH (CDCA), Government's Opposition to Defendant's Motion to Dismiss Re: Selective Prosecution, Declaration of David C. Scheper, Chief of Criminal Complaints Section, 9/90 - 6/92, dated August 6, 1993 at ¶ 5: "... federal agents had properly brought the case to the U.S. Attorney's Office, and the case met our prosecutorial guidelines. These facts, as well as ... intelligence that at least one of the defendants was affiliated with a street gang, led to the decision to prosecute the defendants."
2. *United States v. Washington*, CR 91-632-TJH (CDCA), Hearing of December 13, 1993 at 18, l. 16-21. Assistant United States Attorney Steven Clymer: "Is gang affiliation or gang membership alone an aggravating circumstance under the guidelines (for prosecution)? [D]id it play a role in the charging decision ... ? The answer to both these questions despite any ambiguities in earlier pleadings is no."
3. *United States v. Jamar*, CR 95-432-WMB (CDCA), Government's Opposition to Defendant's Motion to Compel Discovery at 28: "The Task Force [Los Angeles Metropolitan Task Force on Violent Crime] uses both state and federal criminal statutes to dismantle violent street gangs and prosecute their members."
4. *United States v. Washington*, CR 91-632-TJH (CDCA), Hearing of September 27, 1993 at 18, l. 17-20; 20, l. 5-8: The Court: I have yet to see any written criteria. Assistant United States Attorney Julie Werner-Simon: Well, there aren't [any]. ... In fact there is a discussion. The complaints section has a meeting with a supervisor where

they set around and they talk about the criteria, and they establish whether they're sufficient enough to go forward."

Hearing of October 28, 1993 at 6, l. 24-25; 7, l. 1-5: Defense Attorney Paul Rochmes: "The government filed a document that they called a Clarification of Correction, which said that even though at the hearing on September 27th we've been told that there were no written prosecutorial criteria for cocaine-based cases, there are. . . . But those were not attached."

Hearing of December 13, 1993 at 4, l. 24-25; 5, l. 1-6: Assistant United States Attorney Steven Clymer: ". . . as we pointed out to both the parties and the Court in our written filings of the guidelines and our notice of the under seal filing, it's our position that the dissemination of our office's written guidelines will serve no purpose . . . but merely offer a guideline or manual . . . how to avoid federal prosecution."

17

Supreme Court, U.S.
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No. 95-157

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER LEE ARMSTRONG, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

REPLY BRIEF FOR THE UNITED STATES

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22 P/18

TABLE OF AUTHORITIES

Cases:	Page
<i>Ah Sin v. Wittman</i> , 198 U.S. 500 (1905)	10, 11
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	12
<i>Bowman Dairy Co. v. United States</i> , 341 U.S. 214 (1951)	17
<i>Copley Press, Inc. v. Superior Court</i> , 7 Cal. Rptr.2d 841 (1992)	16
<i>Franks v. Delaware</i> , 438 U.S. 154 (1978)	6
<i>Hazelwood School Dist. v. United States</i> , 433 U.S. 299 (1977)	14
<i>McCleskey v. Kemp</i> , 481 U.S. 279 (1987)	7, 13
<i>Roviaro v. United States</i> , 353 U.S. 53 (1957)	6
<i>United States v. Berrios</i> , 501 F.2d 1207 (2d Cir. 1974)	3, 17
<i>United States v. Johnson</i> , 577 F.2d 1304 (5th Cir. 1978)	3
<i>United States v. Mezzanatto</i> , 115 S. Ct. 797 (1995)	6
<i>United States v. Murdock</i> , 548 F.2d 599 (5th Cir. 1977)	3
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	17
<i>United States v. One 1985 Mercedes</i> , 917 F.2d 415 (9th Cir. 1990)	3-4
<i>Wade v. United States</i> , 504 U.S. 181 (1992)	6, 10
<i>Wards Cove Packing Co. v. Atonio</i> , 490 U.S. 642 (1989)	14
<i>Wayte v. United States</i> , 470 U.S. 598 (1985) .	6, 7, 11, 12
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886)	10
 Statutes and rules:	
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e	12
18 U.S.C. 924(c) (1988 & Supp. V 1993)	19

Statutes and rules—Continued:	Page
21 U.S.C. 841(b)(1) (1988 & Supp. V 1993)	19
Fed. R. Civ. P.:	
Rule 1	8
Rule 11	8
Rule 11(d)	8
Rule 26	8
Fed. R. Crim. P.:	
Rule 11(e)(6)	6
Rule 16	2, 3, 4, 5, 7, 8, 17
Advisory committee note (1974 Amendment) .	5
Rule 16(a)(1)(A)	4
Rule 16(a)(1)(B)	4
Rule 16(a)(1)(C)	1, 2, 4, 5, 7
Rule 16(a)(1)(D)	4
Rule 16(a)(1)(E)	4
Rule 16(b)(1970)	5
Rule 17	17
Rule 17(c)	3
Fed. R. Evid.:	
Rule 201(a)	16-17
Rule 201(b)	16-17
Rule 410	6
Miscellaneous:	
2 Charles A. Wright, <i>Federal Practice And Procedure</i> (2d ed. 1982)	3, 17

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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Our position is that, absent direct evidence of a discriminatory purpose, a criminal defendant must make a substantial threshold showing that similarly situated persons of a different race have not been prosecuted in order to obtain discovery from the government on a selective prosecution claim. Respondents offer no adequate reason for eliminating the similarly situated offender requirement.

1. The Martin respondents contend, for the first time in this litigation, that requiring a substantial threshold showing of selective prosecution as a condition to obtaining discovery conflicts with Fed. R. Crim. P. 16(a)(1)(C). Martin Br. 26-38. According

to respondents, Rule 16 requires the government to provide discovery to a defendant so long as "the information already available to a defense attorney is 'sufficient to lead a reasonable person to believe . . . that further inquiry on the subject is warranted.'" Martin Br. 22, quoting Pet. App. 97a (Reinhardt, J., dissenting from the panel opinion in this case). As a general matter, discovery is not available in a criminal case on that slender basis, and respondents' suggestion is particularly unwarranted with respect to discovery incursions into the exercise of prosecutorial discretion.

a. On its face, Rule 16(a)(1)(C) does not give a defendant unrestricted access to the government's files in order to search for a defense to the charges against him. Rather, in authorizing limited discovery in a criminal case, the portion of Rule 16 invoked by respondents specifically requires a defendant to make a threshold showing of materiality:

Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody, or control of the government, and *which are material to the preparation of the defendant's defense* * * *.

Fed. R. Crim. P. 16(a)(1)(C) (emphasis added).

The Rule's restriction on discovery of documents and tangible items to those that are "material to the preparation of the defendant's defense" is a significant limitation. As one commentator has stated, "[i]f defendant requests discovery because he thinks the

documents sought are material to the preparation of his defense, he must make a *prima facie* showing of materiality." Charles A. Wright, *Federal Practice And Procedure* § 254, at 66-67 (2d ed. 1982) (footnote omitted). That requirement means that, before discovery may be ordered, the defendant must establish that he has a factual basis for asserting the defense on which discovery is sought, and that the requested documents or tangible items are relevant and helpful to that defense. See *United States v. Murdock*, 548 F.2d 599, 600 (5th Cir. 1977). The factual showing of "materiality" is to be demonstrated by the defendant "*before* discovery is allowed." *Ibid.* (emphasis added); cf. *United States v. Berrios*, 501 F.2d 1207, 1211-1212 (2d Cir. 1974) (requiring evidentiary showing of "the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements" to obtain enforcement of a subpoena under Fed. R. Crim. P. 17(c) issued in connection with a hearing on a selective prosecution claim).

Because the test under Rule 16 is "materiality," the threshold showing that must be made depends on the defense that is asserted. When information is sought to support a defense of selective prosecution based on race, the defendant must make a threshold showing of race-based selection, *i.e.*, that he was selected for prosecution, while similarly situated persons of a different race were not. *Murdock*, 548 F.2d at 600; *United States v. Johnson*, 577 F.2d 1304, 1309 (5th Cir. 1978) (where the defendant "did not make a *prima facie* showing that he was singled out for prosecution, he did not establish the materiality of the evidence sought" and consequently was not entitled to discovery under Rule 16); see also *United*

States v. One 1985 Mercedes, 917 F.2d 415, 421 (9th Cir. 1990) (in order to obtain discovery on a claim of vindictive prosecution, defendant must introduce evidence tending to establish the essential elements of the claim). It is not sufficient for defense counsel to assert that the information at hand affords what he claims is a reasonable basis for further inquiry.

The structure of Rule 16 confirms that the "materiality" requirement was intended as a significant limitation on a defendant's right to discovery under that portion of the Rule. Rule 16 specifically permits the defendant to obtain discovery of several other categories of information without requiring the defendant to show that they are material to the defense. The government must disclose the defendant's relevant oral or written statements, Rule 16(a)(1)(A); the defendant's criminal record, Rule 16(a)(1)(B); the results of scientific tests that "are intended for use by the government as evidence in chief at the trial," Rule 16(a)(1)(D); summaries of expert witness testimony that the government intends to use "during its case in chief at trial," Rule 16(a)(1)(E); and, most important, all documents and physical objects that "are intended for use by the government as evidence in chief at the trial" or that "were obtained from or belong to the defendant," Rule 16(a)(1)(C). To the extent, however, that a defendant seeks other documents, tangible objects, or scientific reports in the government's possession, he must show that the documents sought are "material to the preparation of the defendant's defense." Rule 16(a)(1)(C) and (D).¹

¹ The history of Rule 16 also supports that analysis. As adopted in 1966, Rule 16 did not specifically address whether a

The Martin respondents contend that, because Rule 16 specifically precludes discovery of three categories of information (internal government documents, witness statements, and grand jury proceedings), interpreting the Rule to require a defendant to establish a threshold showing to obtain information outside those categories would violate the principle of "*expressio[] unius est exclusio alterius*." Martin Br. 27-28. The requirement of a threshold showing, however, does not create a fourth category of information that is categorically shielded from disclosure. Rather it imposes a condition upon obtaining information that may be subject to disclosure, and that condition is drawn directly from the text of Rule 16. The principle of *expressio unius est exclusio alterius* is therefore inapplicable here.

b. The relaxation of discovery standards proposed by respondents is particularly inapt in the present context. The Federal Rules of Criminal Procedure were framed against the backdrop of well-established principles that sharply limit judicial inquiries into

defendant could obtain evidence that the government would introduce at trial or had obtained from the defendant. Instead, those two categories of information were discoverable only "upon a showing of materiality to the preparation of [the defendant's] defense." Fed. R. Crim. P. 16(b) (1970). In 1975, however, Rule 16(a)(1)(C) was amended for the express purpose of relieving a defendant of having to demonstrate materiality in order to obtain those two categories of information. The Advisory Committee reasoned that evidence introduced by the government in its case in chief or obtained from the defendant could be assumed to be "material" without requiring the defendant affirmatively to establish that fact. Fed. R. Crim. P. 16 advisory committee note (1974 Amendment). For other documents, however, the materiality requirement was left intact.

exercises of prosecutorial discretion, and the “materiality” requirement in Rule 16, as applied to such inquiries, necessarily draws its meaning from those principles. Cf. *United States v. Mezzanatto*, 115 S. Ct. 797 (1995) (interpreting Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6) against the background principle that evidentiary privileges may be waived). Just as those principles require a substantial threshold showing of unconstitutional motive before a defendant may obtain discovery on a claim that the government has unconstitutionally withheld a substantial assistance motion, *Wade v. United States*, 504 U.S. 181, 186-187 (1992), so they require a substantial threshold showing of selective prosecution here. See also *Franks v. Delaware*, 438 U.S. 154, 155-156 (1978) (requiring “substantial preliminary showing” as a precondition to a hearing on a claim that a facially valid warrant is invalid because the affiant lied to the magistrate); *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957) (requiring a substantial showing of materiality as a precondition to obtaining discovery of information that would disclose the identity of a confidential informant).

The exercise of discretion in enforcing the criminal law is a core element of the constitutional authority of the Executive Branch, and judicial inquiry into such prosecutorial decisionmaking “entails systemic costs of particular concern.” *Wayte v. United States*, 470 U.S. 598, 607-608 (1985). While respondents’ stated “central purpose” is “to obtain from the government an official articulation of its prosecution criteria,” Martin Br. 59, this Court recognized the general inappropriateness of forcing precisely that form of disclosure in *Wayte*:

Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.

470 U.S. at 607. Those concerns “make the courts properly hesitant to examine the decision whether to prosecute.” *Id.* at 608. See also *McCleskey v. Kemp*, 481 U.S. 279, 296-297 & n.18 (1987) (“the policy considerations behind a prosecutor’s traditionally ‘wide discretion’” suggest the general “impropriety of our requiring prosecutors to defend their decisions”).

Nothing in Rule 16 suggests that the Rule was intended to abrogate those well-established principles and to make judicial inquiries into prosecutorial decisionmaking a routine part of a criminal proceeding. Accordingly, when a defendant invokes Rule 16 to seek discovery to support a claim of selective prosecution, he must make a substantial threshold showing that unconstitutional selective prosecution has occurred.

c. The Martin respondents concede that some threshold showing as to the merits of a proposed defense must be made before discovery under Rule 16(a)(1)(C) may be ordered. They acknowledge that, in the absence of an “objective standard” to determine the “genuineness” of a defense, their construction of Rule 16(a)(1)(C) would result in “the sort of fishing expedition prohibited by criminal and civil discovery principles alike.” Martin Br. 21-22. And respondents do not suggest that the text of Rule 16 provides any

further guidance about the kind of threshold showing required. Rather than interpreting the materiality requirement in light of settled limitations on judicial review of exercises of prosecutorial discretion, however, respondents contend that the test for whether the documents relate to a "genuine defense" should be "gauged by the standard of Rule 11" of the Federal Rules of Civil Procedure. Martin Br. 14-15, 22-23. Respondents would find that test to be satisfied when "the information available to defense counsel is sufficient to lead a reasonable attorney to conclude that further inquiry on the subject is warranted." *Id.* at 23.

For three reasons, Rule 11 provides no source of guidance for the interpretation of Rule 16 of the Federal Rules of Criminal Procedure. First, the set of rules to which Rule 11 belongs is expressly limited to "suits of a civil nature." Fed. R. Civ. P. 1. There is therefore no textual basis for applying Rule 11 in the context of a criminal case. Second, Rule 11 applies to pleadings or motions filed with the court, and is expressly made "[i]napplicab[le] to [d]iscovery," see Fed. R. Civ. P. 11(d). It thus provides a particularly unsuitable frame of reference for measuring entitlement to discovery in a criminal case. Third, it is unlikely that any standard included in the Federal Rules of Civil Procedure would be properly suited to measure whether a criminal defendant may compel discovery from the government on a claim of selective prosecution. The Civil Rules establish a very permissive discovery regime. See Fed. R. Civ. P. 26 (requiring voluntary disclosure of much information regarding the case and permitting additional discovery where reasonably calculated to lead to the discovery of admissible evidence). In contrast, because

of the important public policy of expediting the resolution of criminal cases, the Criminal Rules tightly limit the scope of discovery. See U.S. Br. 19 n.1. Given the very significant differences between the purposes and scope of civil and criminal discovery rules, it would be inappropriate to borrow any civil discovery standard to give content to a criminal discovery rule.

Even more significantly, the Martin respondents' proposed standard does not provide any meaningful protection against intrusive and unnecessary inquiries into prosecutorial decisionmaking. The inevitable consequence of adopting a standard that depends on whether a "reasonable attorney [would] conclude that further inquiry on the subject is warranted" would be to make judicial inquiries into prosecutorial decisions routine in a wide range of cases. As we point out in our petition (Pet. 22 & n.2, 24 & n.4), the standard adopted by the court of appeals in this case has already led to repeated judicial inquiries into claims of selective prosecution in crack and illegal reentry cases. Adoption of respondents' standard, which appears to afford even less protection for prosecutorial decisionmaking, could only accelerate that trend. This Court's cases do not countenance that kind of routine encroachment on prosecutorial authority.²

² Respondent Rozelle contends that, in order to obtain discovery on a claim of selective prosecution, a criminal defendant must establish a "colorable basis" for believing that selective prosecution has occurred. Rozelle Br. 16-17. While courts have often used the phrase "colorable basis" in describing the standard for obtaining discovery on a selective prosecution claim, they have also uniformly held that a defendant must make a threshold showing that similarly situated offenders

2. Respondents next assert (Martin Br. 38-50) that it is unnecessary to make a showing regarding similarly situated offenders who were not prosecuted as a prerequisite to discovery because, in respondents' view, such a showing is not an essential element of a selective prosecution claim at all. Respondents' approach to proving selective prosecution is incorrect. Absent direct evidence of discriminatory motive, evidence that similarly situated offenders have not been prosecuted is essential to establish unconstitutional selective prosecution, see U.S. Br. 21-25, 32-35, and evidence of the same character is thus an essential element of a selective prosecution discovery request.

a. The contrast between this Court's decisions in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Ah Sin v. Wittman*, 198 U.S. 500 (1905), reveals the importance to a selective prosecution claim of establishing that similarly situated offenders have not been prosecuted. In *Yick Wo*, the habeas petitioner's

have not been prosecuted in order to establish a "colorable basis." See U.S. Br. 22-25. The court below is the first to find a "colorable basis" for discovery without imposing a similarly situated offender requirement. While the label for the test is of limited importance, in our view a clearer description of the proper standard would be to characterize it as a "substantial threshold showing." See *Wade*, 504 U.S. at 186 (noting defendant's concession that a "substantial threshold showing" is required to obtain discovery on a claim that the government has acted unconstitutionally in refusing to file a substantial assistance motion). The critical point, however, is that there must be an evidentiary showing to support the claim of improper prosecutorial conduct, and, in this context, that credible evidence must be produced that similarly situated offenders have not been prosecuted before discovery may be ordered.

showing that similarly situated offenders had not been prosecuted led to a finding of an equal protection violation, while in *Ah Sin*, the habeas petitioner's failure to allege that similarly situated persons had not been prosecuted led to a dismissal of the complaint. See U.S. Br. 32-34. Respondents contend that *Ah Sin* merely reflects an application of "stringent pleading requirement[s]." Martin Br. 43-44. Under modern pleading requirements, the habeas petitioner in *Ah Sin* might not have been required to *allege* that similarly situated offenders had not been prosecuted in order to survive a motion to dismiss. But under the holding of that decision, he still would have been required to *prove* that similarly situated offenders had not been prosecuted in order to prevail on the merits. *Ah Sin*, 198 U.S. at 506-508.

Nothing in *Wayte* rejects the view that a selective prosecution claim depends on a showing that similarly situated offenders were not prosecuted. Martin Br. 42-43. The defendant in *Wayte* was a vocal opponent of the draft who reported his nonregistration to the government. He alleged that the government had impermissibly selected him for prosecution on the basis of his vocal opposition to the draft. The evidence established, however, that the government had a neutral policy of prosecuting those who reported their nonregistration to the government, including those who were not vocal opponents of the draft. In light of that evidence, the Court held that the defendant had failed to establish that he had been selected for prosecution based on his vocal opposition to the draft because "[the] facts demonstrate that the Government treated all reported nonregistrants similarly. It did not subject vocal nonregistrants to any special burden." 470 U.S. at 610.

The Martin respondents' contention (Br. 42-43) that *Wayte* rejected a similarly situated offender requirement is therefore incorrect. The Court ruled against the defendant in that case precisely because he was unable to show that similarly situated offenders were treated any differently from him.³ *Wayte* therefore provides no support for dispensing at the discovery stage with the threshold showing of discriminatory selection.

b. In support of their contention that a selective prosecution claim does not require proof that similarly situated offenders have not been prosecuted, the Martin respondents rely (Br. 41-42) on cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, and this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). Selective prosecution claims, however, raise unique concerns that are not implicated by Title VII or *Batson* claims. An employer may be required to defend a hiring or promotion decision, or a litigant to defend a pre-emptory challenge, without imposing any of the "systemic costs" (*Wayte*, 470 U.S. at 607) associated with requiring the government to justify to a federal judge the charging decisions it has made in the case at hand and potentially in many other cases. The standards of proof applicable in those settings, therefore, cannot readily be applied to the selective prosecution setting.

³ The dissent in *Wayte* understood the majority to have imposed a similarly situated offender requirement. The dissent stated that "the Court errs in the manner in which it analyzes the merits of the equal protection claim. It simply focuses on the wrong problem when it states that the 'Government treated all reported nonregistrants similarly.'" 470 U.S. at 629-630 (Marshall, J., dissenting).

This Court's decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987), makes clear the special proof requirements applicable here. In that case, the Court held that claims that prosecutors have exercised their discretion on the basis of race must be supported by "exceptionally clear proof." *Id.* at 297. For that reason, the Court held that the kind of statistical evidence used to prove discrimination in Title VII and jury venire cases could not be used as a basis for shifting the burden of proof to a prosecutor to justify his discretionary decisions. *Id.* at 293-297. The Court explained that "the policy considerations behind a prosecutor's traditionally wide discretion suggest the impropriety of our requiring prosecutors to defend their decisions * * * often years after they were made." *Id.* at 296 (internal quotation marks omitted). And it noted that "[r]equiring a prosecutor to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from requiring a prosecutor to rebut a contemporaneous challenge to his own acts." *Id.* at 296 n.17 (citing *Batson*). In light of *McCleskey*, respondents' reliance on the procedural framework for proving Title VII and *Batson* claims is misplaced.⁴

In any event, where, as here, a party seeks to raise an inference of discrimination based on a statistic or a pattern, Title VII and *Batson* both require a proper

⁴ Respondents attempt to distinguish *McCleskey* on the ground that it involved a challenge to decisions made by juries. Martin Br. 52-53. The claim in *McCleskey*, however, was that both juries and prosecutors had exercised their discretion on the basis of race. And the Court's holding that such a claim must be supported by "exceptionally clear proof" (481 U.S. at 297) applied to both the discretionary decisions of juries and the discretionary decisions of prosecutors. *Id.* at 294-297.

comparison pool. In the Title VII context, the Court has made clear that a plaintiff cannot establish a prima facie case of a discriminatory effect or a discriminatory purpose merely by showing that there is a low percentage of minority employees in a particular job. Rather, there must be a comparison "between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650 (1989) (discriminatory effect); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 306-308 (1977) (discriminatory intent). Similarly, in the *Batson* context, a prima facie case may not be established based solely on evidence that a litigant exercised preemptory challenges to exclude potential jurors of a particular race. For example, a party who strikes ten black jurors in a row has not committed a prima facie *Batson* violation if all of the prospective jurors on the venire are black. A pattern of striking jurors of a particular race is significant only if the litigant has declined to strike jurors of a different race.

c. The Martin respondents argue that, in a variety of settings, a prosecutor's improper selection of a person for prosecution based solely on his race would be immunized from scrutiny by a requirement that a defendant must identify similarly situated offenders who were not prosecuted. Br. 39-40. They claim, for example, that that result would follow when the defendants are charged with an offense that is committed exclusively by members of one race. *Ibid.* That claim is incorrect. If the defendant in such a hypothetical could produce direct evidence of discriminatory intent, or show that he is similarly situated in all relevant respects to persons who

commit a different offense but are not prosecuted, an Equal Protection violation could be sufficiently indicated (at the discovery stage) or established (on the merits). There is no reason to think that if such unconstitutional action were taking place, defendants would be unable to obtain *some* credible evidence of it—and if no such evidence were available, it would plainly be inappropriate to license a "fishing expedition" for it. Martin Br. 22.

In any event, respondents' claim in this case is not that prosecutors have chosen to prosecute crack offenses *because* they are committed exclusively by members of one race. Rather, their claim is that federal prosecutors have selected black crack offenders for federal prosecution, while leaving white crack offenders to be prosecuted by the State of California. Respondents virtually concede that proof of similarly situated offenders who have not been prosecuted is essential to *that* claim by stating that, "[t]o the extent that a defendant argues that improper invidious distinctions were made within a particular group of offenders, such as crack dealers, the comparative treatment of other members of that group would of course be important evidence." Martin Br. 44-45.

3. The Martin respondents contend that requiring a showing that similarly situated offenders have not been prosecuted at the discovery stage would impose a "crippling burden of proof" that will allow racial discrimination to escape undetected. Martin Br. 45-50 & n.66. As we note in our opening brief, however, defendants in other cases have satisfied the similarly situated offender requirement at the discovery stage, U.S. Br. 26-27, and if there were any merit to respondents' claim in this case, they should have been able to satisfy that requirement as well.

One of respondents' counsel submitted a conclusory affidavit below asserting that, in his capacity as a member of the Board of Directors of the Los Angeles County Criminal Courts Bar Association Indigent Defense Panel, he regularly conversed with "many state court judges, prosecutors, and defense attorneys." J.A. 141. There is no reason that respondents could not have obtained concrete information from those sources concerning whether persons who were similarly situated to them were prosecuted by the State of California. The Federal Public Defender's Office in this case searched its own records for information concerning cases closed by its office; there is no reason that it could not have conducted a comparable study of cases closed by local public defenders during the same period. Finally, California law generally makes court records available to the public. *Copley Press, Inc. v. Superior Court*, 7 Cal. Rptr.2d 841, 843-844 (1992). Respondents were free to review those files for evidence that similarly situated persons were prosecuted in state court.⁵ Thus, while the similarly situated offender requirement serves as

⁵ Respondents themselves indicate the feasibility of such an inquiry, by referring to the "Berk study," which was not introduced in this case and is not a part of the record here. That study purported to compare the rates at which blacks are prosecuted for crack offenses in state and federal court. Martin Br. 12-13. While Judge Reinhardt relied on that study in his panel dissent, Pet. App. 101a-102a, in our en banc brief, we objected to the propriety of taking judicial notice of such matters, noting that the study had been extensively attacked for its failure, *inter alia*, to compare similarly situated defendants and could not be described as "not subject to reasonable dispute." U.S. En Banc Br. 8 & n.6 (quoting Fed. R. Evid. 201(a) and (b)). The en banc majority opinion did not refer to the Berk study.

an effective threshold screening device, it does not block meritorious claims.⁶

The Martin respondents assert that it would have been easier for the government to produce information concerning similarly situated offenders than for the respondents to obtain such information themselves. Martin Br. 46-47. The relative ease of acquiring information bears on the propriety of discovery, however, only after a defendant makes the requisite threshold showing of the defense in question. Because it is generally easier for the government than for criminal defendants to obtain information, any other view would lead to the

⁶ It is not our view that "the district judge in this case could properly have issued a subpoena to California officials directing them to produce information about cocaine base dealers prosecuted in state court." Martin Br. 18. A subpoena duces tecum under Fed. R. Crim. P. 17 is "not intended to provide a means of discovery for criminal cases." *United States v. Nixon*, 418 U.S. 683, 698 (1974), citing *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951). And if respondents were seeking evidence under Rule 17 for use at a hearing relating to a selective prosecution defense, they would be required to make the same threshold showing that similarly situated offenders have not been prosecuted that is required by Rule 16. *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974); see also *United States v. Nixon*, 418 U.S. at 698-670 (a party seeking to enforce a Rule 17 subpoena must make a preliminary showing that the materials sought are relevant and admissible); 2 Charles A. Wright, *Federal Practice and Procedure* § 275, at 160 n.8 (2d ed. 1982). The government's statement below that respondents could have pursued subpoenas to obtain state law enforcement records (see Martin Br. 18 n.47) was intended to underscore that respondents had made no independent efforts to obtain the information they sought—not to suggest that such subpoenas could have been enforced over the state's objection.

unacceptable conclusion that a defendant need only allege unconstitutional selective prosecution in order to obtain discovery on that claim.

4. Finally, the Martin respondents argue that the meaning of a similarly situated comparison pool is elusive and that absent discovery, they had no basis for determining the offenders who were "similarly situated" to them. Martin Br. 59. That argument is without merit. Respondents were required to show, at a minimum, that there were offenders not prosecuted who engaged in conduct comparable to the conduct that they were charged with committing. See U.S. Br. 35 n.4. A prosecutor is presumed to act in good faith. See U.S. Br. 18-19, 29-30. Accordingly, when persons not prosecuted have engaged in conduct that is significantly different from those who were prosecuted, the presumption is that the difference in treatment is based on the difference in conduct and not on impermissible considerations such as race. To overcome that presumption, the defendant must make a threshold showing that at least some persons known to the prosecutor have not been prosecuted for engaging in conduct that is sufficiently similar to the conduct that the defendant is charged with committing.

Accordingly, the starting point for respondents was the criminal conduct with which they were charged in the indictment against them. In this case, the indictment against respondents charged them with conspiring to distribute more than 50 grams of cocaine base, and with using guns in furtherance of that conspiracy. J.A. 60-65. Under federal law, both the quantity of drugs and the use of a gun significantly affect the seriousness of a drug trafficking offense. See 21 U.S.C. 841(b)(1) (1988 & Supp. V 1993)

(setting a ten-year minimum for sale of more than 50 grams of cocaine base, and a five-year minimum for sale of more than five grams of cocaine base); 18 U.S.C. 924(c) (1988 & Supp. V 1993) (setting an additional five-year penalty for use of a gun in relation to a drug trafficking offense). To satisfy the similarly situated offender requirement, respondents were therefore required to show that others who were not prosecuted conspired to distribute a comparable amount of cocaine base and used guns in furtherance of that conspiracy. As the panel below correctly concluded (Pet. App 82a-83a), because respondents failed to make that showing, the district court abused its discretion in ordering discovery in this case.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 95-157

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

CHRISTOPHER LEE ARMSTRONG, et al.,

Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

**MOTION FOR LEAVE TO FILE AND
BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

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35 pp

QUESTIONS PRESENTED

1. What standard of evidence must a defendant meet before being entitled to discovery on a claim of discriminatory prosecution?
2. Does evidence that one group of defendants are all of the same race, with no showing of any comparison group of persons not prosecuted, meet this standard?

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,
vs.

CHRISTOPHER LEE ARMSTRONG, et al.,
Respondents.

**MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE
BRIEF IN SUPPORT OF PETITIONER**

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of petitioner in the above-captioned case. Counsel for petitioner has consented to the filing of this brief, as have counsel for four of the five respondents. Counsel for respondent Armstrong (Mr. Dudley) has withheld consent by failure to respond to our numerous attempts to contact him over a period of nearly four weeks.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The criminal justice system does not have infinite resources. Every time the courts create new issues for litigation which are irrelevant to the central question of guilt or innocence, the system is further sapped of its strength and diverted from its central mission.

There can be no doubt that a true case of discriminatory prosecution is a grave injustice, but the rarity of proven cases indicates that real cases are also rare. If a low threshold showing is sufficient to force discovery and an evidentiary hearing on this question, then it threatens to become a routine diversion. The fight against crime is too important to be distracted by the routine pursuit of wild geese.

Acceptance of the minimal threshold showing endorsed by the Court of Appeals in the present case would be contrary to the interests CJLF was formed to protect.

For the foregoing reasons, *amicus curiae* requests for leave to file its brief.

December, 1995

Respectfully submitted,

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TABLE OF CONTENTS

Questions presented	i
Motion for leave to file	iii
Interest of <i>amicus curiae</i>	iii
Table of authorities	vi
Brief <i>amicus curiae</i>	1
Summary of facts and case	1
Summary of argument	3
Argument	4

I

Crack is a dangerous drug, and vigorous enforcement against distributors is entirely appropriate	4
--	---

II

The rule to be established in this case should be expressly based on nonconstitutional sources	6
--	---

III

The Federal Rules of Criminal Procedure provide the proper analytical structure	10
---	----

IV

<i>Wade</i> and <i>Franks</i> provide the appropriate standard	13
--	----

V

The showing in the present case is insufficient	18
Conclusion	24

TABLE OF AUTHORITIES

Cases

Arlington Heights v. Metropolitan Housing Development Corp., 429 U. S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977)	20, 21
Bowman Dairy Co. v. United States, 341 U. S. 214, 95 L. Ed. 879, 71 S. Ct. 675 (1951)	12
Boykin v. Alabama, 395 U. S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969)	8
Brady v. Maryland, 373 U. S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)	8
Brecht v. Abrahamson, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993)	14
Callins v. Collins, 127 L. Ed. 2d 435, 114 S. Ct. 1127 (1994)	22
Copley Press, Inc. v. Superior Court, 6 Cal. App. 4th 104, 7 Cal. Rptr. 841 (1992)	16
Estelle v. McGuire, 502 U. S. 62, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991)	7
Franks v. Delaware, 438 U. S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978)	7, 14
Giglio v. United States, 405 U. S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972)	8
Goeke v. Branch, 131 L. Ed. 2d 152, 115 S. Ct. 1275 (1995)	7
Gomillion v. Lightfoot, 364 U. S. 339, 5 L. Ed. 2d 110, 81 S. Ct. 125 (1960)	21
In re Littlefield, 5 Cal. 4th 122, 851 P. 2d 42 (1994)	17
Irvin v. Dowd, 366 U. S. 717, 6 L. Ed. 2d 751, 81 S. Ct. 1639 (1961)	16

Jackson v. Denno, 378 U. S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774 (1964)	20
Kimmelman v. Morrison, 477 U. S. 365, 91 L. Ed. 2d 305, 106 S. Ct. 2574 (1986)	9
Kyles v. Whitley, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)	8
Leary v. United States, 395 U. S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969)	19
Linkletter v. Walker, 381 U. S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965)	18
Liverpool, New York and Philadelphia S. S. Co. v. Commissioners of Emigration, 113 U. S. 33, 28 L. Ed. 899, 5 S. Ct. 352 (1885)	9
Malloy v. Hogan, 378 U. S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964)	9
Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961)	16
McCleskey v. Kemp, 481 U. S. 279 (1987)	22
McCleskey v. Zant, 580 F. Supp. 338 (ND Ga. 1984)	22
Miranda v. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966)	8
Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340 (1935)	8
Napue v. Illinois, 360 U. S. 264, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959)	8
Palermo v. United States, 360 U. S. 343, 3 L. Ed. 2d 1287, 79 S. Ct. 1217 (1959)	9
People v. Luttenberger, 50 Cal. 3d 1, 265 Cal. Rptr. 690, 784 P. 2d 633 (1990)	7, 8, 17

Solorio v. United States, 483 U. S. 435, 97 L. Ed. 2d 364, 107 S. Ct. 2924 (1987)	14
State v. Russell, 477 N. W. 2d 886 (Minn. 1991)	18
Stein v. New York, 346 U. S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077 (1953)	19
Strickland v. Washington, 466 U. S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)	15
United States v. Adams, 870 F. 2d 1140 (CA6 1989)	10, 23
United States v. Armstrong, 48 F. 3d 1508 (CA9 1995)	Passim
United States v. Augenblick, 393 U. S. 348, 21 L. Ed. 2d 537, 89 S. Ct. 528 (1969)	9
United States v. Bagley, 473 U. S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)	8
United States v. Berrigan, 482 F. 2d 171 (CA3 1973)	10, 11, 12
United States v. Berrios, 501 F. 2d 1207 (CA2 1974)	10, 11, 12
United States v. Bourgeois, 964 F. 2d 935 (CA9 1992)	14, 18
United States v. Gordon, 817 F. 2d 1538 (CA11 1987)	17
United States v. Greenwood, 796 F. 2d 49 (CA4 1986)	17
United States v. Hearst, 412 F. Supp. 863 (ND Cal. 1975)	13
United States v. Heidecke, 900 F. 2d 1155 (CA7 1990)	10, 17
United States v. Johnson, 577 F. 2d 1304 (CA5 1978)	10

United States v. Nixon, 418 U. S. 683, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974)	11
United States v. Nobles, 501 F. 2d 146 (CA9 1974)	12
United States v. Nobles, 422 U. S. 225, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975)	12
United States v. P. H. E., Inc., 965 F. 2d 848 (CA10 1992)	23
United States v. Redondo-Lemos, 955 F. 2d 1296 (CA9 1992)	16
United States v. Simmons, 964 F. 2d 763 (CA8 1992)	18
Wade v. United States, 504 U. S. 181, 118 L. Ed. 2d 524, 112 S. Ct. 1840 (1992)	14
Wardius v. Oregon, 412 U. S. 470, 37 L. Ed. 2d 82, 93 S. Ct. 2208 (1973)	7, 9
Wayte v. United States, 470 U. S. 598, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985)	16, 17, 21, 22, 23
Weatherford v. Bursey, 429 U. S. 545, 51 L. Ed. 2d 30, 97 S. Ct. 837 (1977)	6
Webster v. Fall, 266 U. S. 507, 69 L. Ed. 411, 45 S. Ct. 148 (1925)	14
Williams v. Calderon, 52 F. 3d 1465 (CA9 1994)	15
Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064 (1886)	21

United States Statutes

18 U. S. C. § 924	2
21 U. S. C. § 841	2, 6
28 U. S. C. § 84	16
P. L. 104-38 (Oct. 30, 1995)	5, 6, 20

State Statutes

Cal. Govt. Code § 27700	16
Cal. Health & Safety Code § 11351.5	2
Cal. Health & Safety Code § 11353	2
Cal. Penal Code § 667	2
Cal. Penal Code § 667.75	2
Cal. Penal Code § 1054.5	17
Cal. Penal Code § 1192.7	2
Cal. Penal Code § 12022.5	2

Federal Rules of Court

Fed. Rules Crim. Proc., Rule 16	12, 13
Rule 17	12, 13
Fed. Rules Evid., Rule 401	12
Rule 402	12
Rule 501	12

Treatises

B. Witkin & N. Epstein, Cal. Criminal Law (2d ed. 1989 & 1995 Supp.)	17
C. Wright, Federal Practice & Procedure—Criminal (2d ed. 1982 & 1995 Supp.)	12, 13

Miscellaneous

141 Cong. Rec. S14782 (Sept. 29, 1995)	5
141 Cong. Rec. H10283 (Oct. 28, 1995)	5
141 Cong. Rec. H10284 (Oct. 28, 1995)	5

Baldus, Pulaski & Woodworth, Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. Crim. L. & Criminology 661 (1983)	16
A. Bequai, Organized Crime (1979)	19
V. Flango, Habeas Corpus in State and Federal Courts (1994)	15
Shein, Racial Disparity in "Crack" Cocaine Sentencing, 8 Crim. Just. 28 (Summer 1993)	18
Commission on the Future of the California Courts, Justice in the Balance—2020 (1993)	15
Statement by the President on Signing S. 1254 (Oct. 30, 1995)	4
U. S. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1993 (1994)	15
U. S. Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy (1995)	4, 5, 6, 19
U. S. Sentencing Commission, Statement of the Commission Majority in Support of Recommended Changes in Cocaine and Federal Sentencing Policy, 57 BNA CrL 2128 (May 1, 1995)	5

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,
vs.

CHRISTOPHER LEE ARMSTRONG, et al.,
Respondents.

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

SUMMARY OF FACTS AND CASE

Five defendants, all of whom are black, were charged in federal court with conspiracy to distribute cocaine base. Additional counts against some defendants included selling cocaine base and using a firearm in connection with a drug violation. The defendants claimed that the decision to prosecute them in federal rather than state court was racially discriminatory and requested discovery on this claim. The sole basis for the original request was a study by the Federal Public Defender showing that in each of the 24 cases of this type closed by that office in 1991 the defendant was black. *United States v. Armstrong*, 48 F. 3d 1508, 1511 (CA9 1995) (en banc).

No showing was made of a comparison group of others, similarly situated, who were prosecuted in state court instead. *Id.*, at 1527 (Rymer, J., dissenting). No explanation was given as to why the particular data set was chosen for the study. *Id.*, at 1530, n. 13.

Congress has established substantial penalties for persons trafficking in substantial quantities of cocaine base. Under 21 U. S. C. § 841(b)(1)(A)(iii), persons convicted of such an offense involving over 50 grams receive a minimum sentence of 10 years. An additional five years may be imposed for use of a firearm in connection with the offense. 18 U. S. C. § 924(c)(1).

Penalties under California law are generally less, but not necessarily as much less as the majority opinion below implies. California sentencing is a complex system of base terms and enhancements. The base term for possession of cocaine base for sale is, indeed, three, four, or five years. Cal. Health & Safety Code § 11351.5. The firearm enhancement statute, which is similar to 18 U. S. C. § 924(c), may well add up to five years in this case. See Cal. Penal Code § 12022.5(c).

It is difficult to say what other enhancements might apply in state court, as the factors involved there would not necessarily be alleged in federal court. For example, while 21 U. S. C. § 841 sharply distinguishes cocaine and cocaine base, it does not distinguish sales to or through minors from those involving only adults. California law punishes use of a minor for such sales by up to nine years in prison for the first offense, Cal. Health & Safety Code § 11353, and life in prison with a minimum of 17 years before parole for the third offense. Cal. Penal Code § 667.75. Selling cocaine to minors is a "serious felony," *id.*, § 1192.7(c), cl. 24, resulting in a five-year enhancement for each previous serious felony. *Id.*, § 667(a).

Thus, the maximum sentence in another sentencing system cannot be determined simply by looking up the term for the basic offense, as the Court of Appeals majority did in the present case, 48 F. 3d, at 1511, because it may depend on facts which the government had no reason to allege in the federal prosecution.

The district court granted the discovery motion and issued a sweeping discovery order, ordering the government to create compilations of data and answer specific questions. *Ibid.* The government moved for reconsideration and offered data and explanations in response to the claim of discrimination. *Ibid.*

The district court denied reconsideration and dismissed the action as a sanction for the government's refusal to comply with discovery. The dismissal was stayed pending appeal. The Ninth

Circuit originally reversed, finding that the defendants had not met the "colorable basis" test, 21 F. 3d 1431, but then granted rehearing en banc and affirmed.

SUMMARY OF ARGUMENT

Crack cocaine is a dangerous drug. Vigorous prosecution of its distributors is appropriate. Prosecution policies that focus on higher-level and better-organized distributors, in preference to low-level, individual user-dealers, are also appropriate and are fully consistent with the policy that Congress has recently established.

There is no general constitutional right to discovery in a criminal case, even when the underlying claim is a constitutional one. The present case should be expressly decided on nonconstitutional grounds, such as the Federal Rules of Criminal Procedure, to preclude any mistaken impression that the rule established is binding on the states or immune from Congressional modification.

The Federal Rules of Criminal Procedure, ignored by the opinion below, provide the structure for analysis. To be discoverable under Rule 16 or subject to subpoena under Rule 17, the material sought, if not privileged, must be relevant to a question actually at issue. This requires some preliminary showing.

Wade v. United States required a "substantial" showing. So did *Franks v. Delaware* in an analogous situation. This term is better than "colorable," which has caused confusion. A "substantial" threshold will raise the bar high enough to prevent meritless claims from becoming routine.

The showing in the present case was not even close to sufficient. For criminal gangs to be organized on ethnic lines is not unusual in America. For a gang or group of gangs to dominate a segment of crime in a particular area is also not unusual.

To make a substantial showing of discriminatory prosecution with statistics alone would require a comparison pool, controlled on all the major variables for legitimate differential treatment.

As a practical matter, most discriminatory prosecution cases will require direct evidence of discriminatory intent.

ARGUMENT

I. Crack is a dangerous drug, and vigorous enforcement against distributors is entirely appropriate.

President Clinton recently had this to say about crack cocaine:

"Trafficking in crack, and the violence it fosters, has a devastating impact on communities across America, especially inner-city communities. Tough penalties for crack trafficking are required because of the effect on individuals and families, related gang activity, turf battles, and other violence." Statement by the President on Signing S. 1254 (Oct. 30, 1995).

Although cocaine is not physiologically addictive, it is psychologically addictive. Crack poses a greater danger of ensnaring casual users in the web of addiction because of the manner in which it is administered. U. S. Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy 181 (1995) (cited below as "USSC Report").

Cocaine has its effects only when it reaches the central nervous system, especially the brain. *Id.*, at 14. "The psychotropic feelings, described as 'stimulated' or 'high,' are correlated to the *rate* of increased concentration of cocaine in the blood, particularly *blood flowing to the brain*. The faster cocaine reaches the *brain*, the greater the intensity of the psychotropic effects." *Id.*, at 15-19 (emphasis added).

Cocaine can be taken four ways: injection, inhalation (smoking), insufflation ("snorting"), or ingestion. Cocaine base, or crack, is smoked, while powder is used the other three ways.¹ Inhalation provides by far the fastest "high," with the

1. Powder cocaine can be inhaled by "freebasing," but that dangerous practice has become relatively rare since the advent of crack. *Id.*, at 182, n. 1.

maximum psychological response only a single minute after use, four times faster than injection and twenty times faster than insufflation. *Id.*, at 18, Figure 4; *id.*, at 29, Table 2.

The difference between smoking and insufflation is the important comparison for considering the danger of addicting casual users, since few beginners will inject themselves. *Id.*, at 183, and n. 3. Cocaine powder lodges in the mucous membranes of the nasal cavity and is absorbed into the capillaries. This relatively slow route of administration results in a slower, lower, longer "high" and is less likely to result in drug dependence. *Id.*, at 28.

Along with the greater danger of addiction is the violent crime associated with crack cocaine distribution. "[T]he available research suggests that crack cocaine is significantly associated with systemic crime—that is, crime related to its marketing and distribution." *Id.*, at 185. The Sentencing Commission acknowledged that crack had "higher addictive qualities," *id.*, at 183, and was associated with "more criminal activity," *id.*, at 186, but found neither difference quantifiable. *Id.*, at 183, 186.

The Commission strongly recommended against the present 100-to-1 powder/crack ratio for mandatory minimum sentences, *id.*, at 198, but left open the possibility that some increased ratio was appropriate. *Id.*, at xv. The Commission subsequently decided against any differential by the barest of majorities. U. S. Sentencing Commission, Statement of the Commission Majority in Support of Recommended Changes in Cocaine and Federal Sentencing Policy, 57 BNA CrL 2128, 2130 (May 1, 1995). The dissenters believed that a differential was appropriate for distributors but not users. *Id.*, at 2131, and n. 2.

The elected branches of government emphatically agreed with the dissent. Public Law 104-38 (S. 1254) passed the Senate without recorded dissent. 141 Cong. Rec. S14782 (Sept. 29, 1995). It passed the House after a similar House bill had passed 332 to 83. 141 Cong. Rec. H10283-10284 (Oct. 18, 1995). As noted earlier, the President emphatically endorsed the bill's rejection of lower penalties for distributing crack cocaine.

Public Law 104-38 sends the issue back to the Sentencing Commission with a number of guidelines. Among these are that

people who traffic in crack should be sentenced more severely than those who traffic in powder cocaine, P. L. 104-38 § 2(a)(1)(A), and that those who operate organizations of five or more people in trafficking should be sentenced more severely. *Id.*, § 2(a)(1)(D)(xi).

Thus, both Congress and the Sentencing Commission dissenters agreed that the severe sentences imposed by federal law on mere users of crack cocaine, as opposed to traffickers, are inappropriate. An exercise of prosecutorial discretion which sought high federal penalties against organized traffickers, while relegating users and isolated, low-level dealers to the generally lesser penalties of state law, would not only be based on a legitimate law enforcement purpose; it would be in line with what Congress has since indicated is appropriate.

The U. S. Attorneys for the Central District of California and the District of Columbia have adopted a threshold of 50 grams for prosecution in federal court. USSC Report, *supra*, at 139, and n. 92; *id.*, at 143, and n. 94. This exercise of discretion amounts to a nullification of the much-criticized mandatory minimum sentence for 5 grams of crack, see 21 U. S. C. § 841(b)(1)(B)(iii), an amount likely to be possessed by a low-level user-dealer. See USSC Report, *supra*, at 171, 174.

In summary, then, crack cocaine is a particularly dangerous drug requiring stronger prosecution and penalties. Congress made that determination when it first distinguished crack from powder, and it has reaffirmed it in light of accumulated knowledge by large, bipartisan majorities and with the emphatic approval of the President. Prosecution policies which focus these penalties on dealers in substantial quantities who work in organized operations, as opposed to low-level, individual user-dealers, are entirely in accord with Congressional policy.

II. The rule to be established in this case should be expressly based on nonconstitutional sources.

"There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford v. Bursey*, 429 U. S. 545, 559 (1977). "[T]he Due Process Clause has little to say regarding the amount of discovery which the

parties must be afforded" *Wardius v. Oregon*, 412 U. S. 470, 474 (1973) (although disallowing one-way discovery).

The Court of Appeals in the present case asserted that a right of discovery exists without identifying its source. *United States v. Armstrong*, 48 F. 3d 1508, 1512-1515 (CA9 1995) (en banc). This is a dangerous omission in a case where the underlying claim is constitutional. Lower courts can slip too easily into the error of assuming that any rule which implements a constitutional right must itself be constitutional.

The distinction between constitutional and nonconstitutional rules is overlooked too easily and too often. See, e.g., *Estelle v. McGuire*, 502 U. S. 62, 67-68, and n. 2 (1991). The distinction is a vital one, however, because rules promulgated under this Court's supervisory power are not binding on state courts. Just last term, this Court summarily reversed a grant of federal habeas relief to a state prisoner by a federal court which had paid insufficient attention to this basic distinction. *Goeke v. Branch*, 131 L. Ed. 2d 152, 158-159, 115 S. Ct. 1275, 1278 (1995).

The California Supreme Court explored the distinction between constitutional rules and discovery procedures in cases involving those rules in *People v. Lutenberger*, 50 Cal. 3d 1, 784 P. 2d 633 (1990). In that case, the defendant sought discovery under earlier state case law "for purposes of challenging the accuracy of statements made in an affidavit in support of a search warrant." *Id.*, at 6, 784 P. 2d, at 635. After the case authorizing such discovery, however, the people of the state had abolished the independent state exclusionary rule, so that the merits of the underlying claim would be governed by the federal rule of *Franks v. Delaware*, 438 U. S. 154 (1978). *Lutenberger*, 50 Cal. 3d, at 11, 784 P. 2d, at 639. The prosecution claimed that because *Franks* required a "substantial preliminary showing" for an evidentiary hearing, the state courts could not authorize discovery upon a lesser showing. *Id.*, at 12, 784 P. 2d, at 639.

The court rejected this argument. "[T]he fact that the discovery at issue may yield information to support a challenge to the affidavit and an eventual motion to suppress . . . does not

mean that the discovery is therefore also governed exclusively by federal principles." *Id.*, at 17, 784 P. 2d, at 643.

This Court, of course, can and has promulgated constitutional rules of procedure, binding on the states, to implement or protect a constitutional right. The advisement requirements for guilty pleas, *Boykin v. Alabama*, 395 U. S. 238 (1969), and in-custody confessions, *Miranda v. Arizona*, 384 U. S. 436 (1966), are examples. Decisions of this type are among the most controversial in criminal law and raise grave questions about this Court exceeding its constitutional authority and violating the people's right of self-government. See *Boykin*, 395 U. S., at 245 (Harlan, J., dissenting); *Miranda*, 384 U. S., at 525-526 (Harlan, J., dissenting). Creation of any more such rules would require compelling justification, to say the least.

The cases finding an affirmative constitutional duty to disclose evidence have been narrow and limited, as the quotes at the beginning of this part, *ante*, at 6, indicate. These cases were reviewed recently in *Kyles v. Whitley*, 131 L. Ed. 2d 490, 505-510, 115 S. Ct. 1555, 1565-1569 (1995). Briefly, the requirement has its roots in the rule of *Mooney v. Holohan*, 294 U. S. 103, 112 (1935) that the prosecution cannot knowingly use perjured testimony. *Napue v. Illinois*, 360 U. S. 264, 269 (1959) extended this prohibition to the prosecution's failure to correct testimony it knew was false but did not solicit.

Brady v. Maryland, 373 U. S. 83, 86-87 (1963) further extended *Mooney* to favorable evidence "material either to guilt or to punishment" even in the absence of the introduction of false evidence. *Giglio v. United States*, 405 U. S. 150, 153-154 (1972) applied *Brady* and *Napue* to a false statement by the prosecution's principal witness that he had not been given promises of leniency in return for his testimony. While not directly bearing on actual guilt or innocence, the credibility of the witness was an essential part of that determination. *United States v. Bagley*, 473 U. S. 667 (1985) defined *Brady* materiality with the same standard used for "prejudice" in ineffective assistance cases: "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.*, at 682.

The question remains open whether the "confidence in the outcome" test can ever be met on a collateral issue irrelevant to actual innocence. Justice Powell discussed the issue *sua sponte* in his concurrence in *Kimmelman v. Morrison*, 477 U. S. 365, 394-397 (1986), but the issue had not been raised by the parties and was not decided by the Court. *Id.*, at 397-398.

A claim of selective prosecution is similar to the exclusionary rule claim in *Kimmelman* in the sense that the defendant seeks acquittal not on the ground that he is innocent, but rather because he claims the government is guilty. This Court has not yet extended the constitutional mandate of *Brady* to encompass such claims, and this would be an inappropriate case in which to make an extension. The Court of Appeals did not state the basis of the authority to order discovery and did not consider the constitutional complexities of extending *Brady*.

Other than the narrow requirement of *Brady*, the reciprocity requirement of *Wardius, supra*, and the privilege against self-incrimination, *Malloy v. Hogan*, 378 U. S. 1, 6 (1964) (incorporation), the questions of how much discovery to make available in criminal cases and what mechanisms to provide have been decided separately by the federal government and each of the several States. See *Wardius, supra*, 412 U. S., at 474-475; *United States v. Augenblick*, 393 U. S. 348, 356 (1969). Within each sovereign, moreover, courts have made rules interstitially, but the legislative authority has had ultimate control. See *Palermo v. United States*, 360 U. S. 343, 353, n. 11 (1959) (Jencks Act). Any change to this allocation of authority, either state v. federal or legislative v. judicial, should be made only after the most careful and thorough consideration.

For the present case, it is sufficient and, *amicus* submits, necessary to state that preexisting case law does not recognize a constitutional mandate for the discovery sought here, and defendants have not asked this Court to recognize one. Whatever standard the Court may decide is proper should be based expressly on nonconstitutional sources, applicable solely to the federal courts and subject to Congressional modification. Creation of a constitutional rule can be considered if and when the need arises. See *Liverpool, New York and Philadelphia S. S. Co. v. Commissioners of Emigration*, 113 U. S. 33, 39 (1885).

III. The Federal Rules of Criminal Procedure provide the proper analytical structure.

Although there is some variation in the circuits, most of them cite *United States v. Berrigan*, 482 F. 2d 171 (CA3 1973) and *United States v. Berrios*, 501 F. 2d 1207 (CA2 1974) as the germinal cases in the area. See, e.g., *United States v. Johnson*, 577 F. 2d 1304, 1308 (CA5 1978) (quoting *Berrios*); *United States v. Heidecke*, 900 F. 2d 1155, 1158-1559 (CA7 1990) (citing both, following *Berrios* for "colorable basis"); *United States v. Adams*, 870 F. 2d 1140, 1146 (CA6 1989) (following cases quoting *Berrios*). A close look at these cases is in order.

During the Vietnam War, the notorious Father Philip Berrigan and Sister Elizabeth McAlister exchanged letters planning a bizarre plot to kidnap Henry Kissinger and have him tried by a kangaroo court of "big wigs of the liberal ilk . . . [who would] also [be] kidnapped if necessary" *Berrigan*, *supra*, 482 F. 2d, at 178. They also planned to destroy parts of the Washington, D.C. utility system. *Id.*, at 179. These letters were smuggled in and out of Lewisberg Federal Penitentiary, in violation of 18 U. S. C. § 1791. *Id.*, at 173. The defendants claimed that they were prosecuted under this rarely enforced statute as political retaliation for their antiwar efforts. *Ibid.*

The procedure in the case was somewhat irregular; the discriminatory prosecution question was considered post-trial, *id.*, at 176, rather than pretrial. In the course of discussing the merits of the claim the court said, "Without denigrating the importance of the right of a person accused of crime to establish the presence of discriminatory prosecution, central to the issue must be *some initial showing* that there is a *colorable basis* for the contention." *Id.*, at 177 (emphasis added). The purpose of this showing is not entirely clear, since this statement occurs in Part I B of the opinion, discussing the trial judge's ruling on the merits, not discovery, the setting of a hearing, or the conduct of the hearing. On the merits, *Berrigan* holds, in essence, that people prosecuted for smuggling letters hatching bizarre and dramatic conspiracies against national security are not similarly situated with run-of-the-mill prison smugglers. See *id.*, at 179.

Part I C of the opinion, dealing with the conduct of the hearing, is most pertinent to the present case. The district court

refused to let Berrigan's counsel call the government's attorneys as witnesses and quashed a sweeping subpoena for "all documents in the government's files dealing with the decision to investigate and prosecute the case." *Id.*, at 180. The questioning of attorneys was disallowed on the grounds of separation of powers. *Id.*, at 180-181. The subpoena was quashed on similar grounds of executive privilege but also on the specific exemption from discovery in Rule 16(b) of the Federal Rules of Criminal Procedure. *Id.*, at 181.

Not long after *Berrigan*, this Court recognized that executive privilege is not absolute and must, in appropriate cases, give way to the judicial need to reach the truth. *United States v. Nixon*, 418 U. S. 683, 707 (1974). That case, however, involved a much stronger preliminary showing. See *id.*, at 700. In *Berrigan*, "appellants failed to meet their burden of proving a *colorable entitlement* to the defense of discriminatory prosecution so as to entitle them to the desired testimonial and documentary evidence." 482 F. 2d, at 181 (emphasis added).

Berrios, *supra*, 501 F. 2d, at 1211, adopted the phrase "colorable basis" from *Berrigan*, but placed a more coherent structure on the discovery issues. *Berrios*, like the present case, was an appeal by the government after dismissal of the case, following the government's refusal to turn over documents. *Id.*, at 1209.

Berrios was an official of the Teamsters Union despite his previous conviction of arson, in violation of 29 U. S. C. § 504. *Ibid.* This fact came to the U. S. Attorney's attention when Berrios was investigated for another labor-related arson. *Id.*, at 1210. Berrios claimed that "there are hundreds of unions with officers who have prison records," and that he was singled out because of his political and labor activity. *Id.*, at 1209-1210.

To decide what is discoverable and under what circumstances, the *Berrios* court turned to the Federal Rules of Criminal Procedure. First, *Berrios* noted, as *Berrigan* had, that the government's internal reports, memoranda, and other documents prepared by government agents are unequivocally exempt from discovery under Rule 16. 501 F. 2d, at 1211.

"Upon an *adequate preliminary showing* of relevancy, however, the district court may hold a hearing upon a motion

raising defenses or objections, [former] Rule 12(b)(4), F. R. Crim. P., and issue a subpoena directing the government to produce books, papers or records for introduction at the hearing, Rule 17(c), F. R. Crim. P." *Ibid.* (emphasis added).

Under Rule 17, materials may be subpoenaed which are not within the scope of Rule 16 discovery, but only if they are admissible evidence. *Bowman Dairy Co. v. United States*, 341 U. S. 214, 220-221 (1951). Use of the subpoena for "a fishing expedition to see what may turn up" is not allowed. *Id.*, at 221. If the subpoena calls for materials not admissible as evidence it is invalid. *Id.*, at 220-221.

Materials not protected from discovery by Rule 16(a)(2) are discoverable under Rule 16(a)(1)(C) only if they are "material to the preparation of the defendant's defense."² Materials sought under Rule 17 can be subpoenaed only if they are admissible, and they are admissible, among other requirements, only if they are relevant to a fact of consequence to the determination of the action and not privileged. Fed. Rules Evid. 401, 402, 501.³ Under either rule, then, there must be a showing that discriminatory prosecution is a genuine issue in the case before any production can be ordered.

Regrettably, later decisions, including the present one, seem to have cut loose from the moorings of the Rules. In a case about pretrial discovery, the opinion below does not once mention Rule 16. In an earlier case, the Ninth Circuit held that it could not order production of material expressly exempted from discovery by Rule 16. *United States v. Nobles*, 501 F. 2d 146 (1974). This Court reversed only on the ground that Rule 16 is limited to *pretrial* discovery and does not extend to production orders *during* trial. *United States v. Nobles*, 422

2. The Rule provides two other grounds of discoverability, intended for use by the government at trial and obtained from or belonging to the defendant, neither of which is likely to apply in this context.

3. Professor Wright says that the use of Rule 17 to obtain materials not discoverable under Rule 16 is no longer necessary, 2 C. Wright, Federal Practice & Procedure—Criminal § 274, p. 158 (2d ed. 1982), at least as to materials held by the government. *Id.*, at 48 (1995 Supp.).

U. S. 225, 234-236 (1975). The *Nobles* Court implicitly agreed with the Ninth Circuit's basic premise that Rule 16's exclusions from discovery, particularly the broadly defined work-product exclusion, are controlling pretrial, and the district judge has no authority to order discovered what Congress has protected. See also *United States v. Hearst*, 412 F. Supp. 863, 866 (ND Cal. 1975).

Review of the scope of the order issued by the district court in the present case is not within the question presented, see Pet. for Cert. i, but the order is a significant indication of how far that court has strayed from the Rules. The district court ordered the government to create new documents, rather than disclose existing ones, and effectively ordered the government to answer interrogatories. See *id.*, at 3. Yet it is well established that these kinds of discovery are not available in criminal cases. 2 C. Wright, Federal Practice and Procedure—Criminal § 254, pp. 64-66, nn. 12, 18 (2d ed. 1982).

In short, then, a return to *Berrios*' emphasis on the Federal Rules of Criminal Procedure is in order. If the appropriate threshold showing has been made, nonprivileged documents can be discovered under Rule 16(a)(1)(C), to the extent they are not precluded by Rule 16(a)(2). If a showing sufficient for an evidentiary hearing has been made, nonprivileged documents admissible in evidence can be subpoenaed under Rule 17. The remaining question is the definition of that threshold showing.

IV. *Wade* and *Franks* provide the appropriate standard.

On one point, the opinion below is correct. "[T]he meaning of 'colorable basis' . . . has proved elusive" *United States v. Armstrong*, 48 F. 3d 1508, 1513 (CA9 1995). An earlier Ninth Circuit precedent used these words to describe "a 'high threshold' that should rarely justify discovery." *Ibid.* (quoting *United States v. Bourgeois*, 964 F. 2d 935, 940 (1992)). The en banc court in the present case used the same words to describe a standard so low that discovery can be ordered every time gangs

of a particular ethnic group corner a particular racket.⁴ A standard which generates that much confusion should be reconsidered. See *Solorio v. United States*, 483 U. S. 435, 450 (1987).

In *Wade v. United States*, 504 U. S. 181, 186 (1992), the Court accepted Wade's concession "that a defendant has no right to discovery or an evidentiary hearing unless he makes a 'substantial threshold showing.'" A point conceded and accepted may have more precedential force than a question merely lurking in the record, which has none. See *Webster v. Fall*, 266 U. S. 507, 511 (1925). Yet, at least arguably, it has less force than a decision on a point actively contested. See *Brecht v. Abrahamson*, 123 L. Ed. 2d 353, 368, 113 S. Ct. 1710, 1718 (1993). Precedent or not, *amicus* believes that the standard stated in *Wade* is a better formulation than the term "colorable basis," and it is a closer approximation to what the courts using the latter term really meant in the cases prior to the present one.

For a precedent on a closely analogous question which was actively contested, we turn to *Franks v. Delaware*, 438 U. S. 154 (1978). *Franks* involved the question of whether a defendant could challenge a facially valid warrant on the ground that the affiant lied to the issuing magistrate. The Court held that an evidentiary hearing on that issue was required only upon a "substantial preliminary showing." *Id.*, at 155-156. "Preliminary" is functionally the same as "threshold" in this context, and hence the *Franks* standard is the same as the *Wade* standard.

One of the considerations which convinced the *Franks* Court to require such a showing applies equally to the present case. A *Franks* hearing, like a discriminatory prosecution hearing, diverts resources from "the pressing question of guilt or innocence." *Id.*, at 167. "The weight of criminal dockets, and the need to prevent diversion of attention from the main issue of guilt or innocence, militate against such an added burden on the trial courts." *Ibid.* A "sensible threshold showing" was required to keep this burden within bounds. *Id.*, at 170.

4. See *post*, at 19, for a discussion of why this is not unusual.

This consideration is even more important today than it was when *Franks* was decided. Justice is sacrificed daily on the altar of limited resources. The odious practice of plea bargaining has become the principal method of disposing of cases. See U. S. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1993*, p. 536 (1994). Civil cases of great importance to their parties sit on the back burner as criminal cases get priority. See, e.g., *Commission on the Future of the California Courts, Justice in the Balance—2020*, p. 147 (1993). Courts should think long and hard before tossing another brick on this staggering camel's back.

Concerns about a flood of frivolous motions are not idle speculation. Such a flood has followed in the wake of *Strickland v. Washington*, 466 U. S. 668 (1984). A recent study found ineffective assistance claims raised in 45 percent of noncapital federal habeas petitions, V. Flango, *Habeas Corpus in State and Federal Courts* 47 (1994), although less than one percent of such claims were granted. *Id.*, at 62, Table 17. In capital cases, where petitioners generally have counsel, the situation is worse, not better. "An unfortunate offshoot of death penalty litigation has been the recurrent demonization of prior counsel" *Williams v. Calderon*, 52 F. 3d 1465, 1470, n. 3 (CA9 1995).

America's criminal justice system does not need another resource-gobbling side issue to be alleged by criminals, caught red-handed, who have nothing else to argue.⁵ The threshold showing must be high enough that the claim cannot be lightly made.

The court below, regrettably, appears to have had exactly the opposite goal in mind. "Defendants attempting to show a colorable basis that warrants discovery can only be expected to make good faith efforts to obtain whatever evidence is readily available" *United States v. Armstrong, supra*, 48 F. 3d, at 1514 (emphasis added). "Nor are defendants required to compile facts which are not easily obtainable by them." *Ibid.* (emphasis added).

5. "Mules seldom have a viable defense, generally having been corralled red-hoofed with large quantities of illegal drugs at or near the border." *United States v. Redondo-Lemos*, 955 F. 2d 1296, 1298 (CA9 1992).

Where is the compelling social need to pave a yellow brick road for these claims? Is discriminatory prosecution rampant in the land, such that new remedies must be created or existing ones expanded to address it? Cf. *Mapp v. Ohio*, 367 U. S. 643, 651 (1961) (exclusion needed because other remedies had failed); *Irvin v. Dowd*, 366 U. S. 717, 730 (1961) (Frankfurter, J., concurring) (broad federal habeas needed because, at the time, state courts routinely disregarded fundamental unfairness). That case has not been made.

Statistics on allegedly discriminatory application of the criminal law can be gathered and have been gathered from public records. See, e.g., Baldus, Pulaski & Woodworth, Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. Crim. L. & Criminology 661, 680-681 (1983). The present case involves allegations of prosecution in state versus federal court of persons represented by the public defender. A comparison pool, see *Armstrong, supra*, 48 F. 3d, at 1530 (dissent), could be found in the case files of persons represented by the county public defenders of the seven counties comprising the Central District of California. See 28 U. S. C. § 84(c) (boundaries of CD Cal.); Cal. Govt. Code § 27700 (establishment of public defender by county). If this task is too large, both samples could be limited to offenses occurring in Los Angeles County. This information is no more available to the federal prosecutor than it is to the federal defender. In addition to their own files and those of the county public defenders, state court records are generally open to the public. See *Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106, 111-112, 7 Cal. Rptr. 841 (1992).

Considering both the separation of powers problem, see *Wayte v. United States*, 470 U. S. 598, 607-608 (1985), and the resource allocation problem, intelligible standards need to be set. There are up to three different standards to be considered: (1) a standard to obtain discovery; (2) a standard to warrant an evidentiary hearing; and (3) a standard to establish the defense and obtain dismissal of the prosecution.

The final standard was firmly established in *Wayte*, 470 U. S., at 608. The defendant must "show both that the [prosecu-

tion policy] had a discriminatory effect and that it was motivated by a discriminatory purpose."⁶

With the elements of the defense established, the next question is whether the standard for discovery should be any lower than the standard for a hearing. Some cases have held that the two standards are the same. See *United States v. Gordon*, 817 F. 2d 1538, 1540 (CA11 1987); *United States v. Greenwood*, 796 F. 2d 49, 52 (CA4 1986). Others have held that different standards apply. See, e.g., *United States v. Heidecke*, 900 F. 2d 1155 (CA7 1990).

In some contexts, there is considerable force to the argument that a lower threshold should be set for discovery, with the fruits of the discovery used to meet the higher burden for an evidentiary hearing. *People v. Luttenberger*, 50 Cal. 3d 1, 18, 784 P. 2d 633, 643-644 (1990) established such a rule in a Fourth Amendment context where compliance with the discovery was simple and where there was no issue of intrusion into the discretionary functions of another branch of government.⁷

Significant differences exist in the discriminatory prosecution context. By definition, discriminatory prosecution occurs across the whole class of comparable cases and not just in one isolated case. In a Fourth Amendment context, an individual police officer could make up a nonexistent confidential informant, and no one would ever know. In the present context, a standing policy of targeting one racial group while treating another leniently would be difficult to conceal for long. Employees working on the cases could see the pattern, and nearly every office of any size has some disgruntled employees or former employees. Also, as noted *ante*, at 16, a significant portion of

6. The latter element is self-proving if the prosecution uses "an overtly discriminatory classification." See *id.*, at 608, n. 10.

7. *Luttenberger* is also distinguishable as the product of a court-created regime of liberal defense discovery quite different from the federal rules, see 5 B. Witkin & N. Epstein, Cal. Criminal Law §§ 2493-2499, pp. 2995-3000 (2d ed. 1989), and subsequently abolished by the people. See *id.*, § 2498D, p. 19 (1995 Supp.); Cal. Penal Code § 1054.5; *In re Littlefield*, 5 Cal. 4th 122, 129, 851 P. 2d 42, 47 (1994).

the evidence is in public records. The need for discovery is reduced in this context.

On the other side of the ledger, the damage is largely complete upon discovery. Like an unreasonable search, the discovery itself is the injury, not the later use of the products in court. Cf. *Linkletter v. Walker*, 381 U. S. 618, 637 (1965). In the present context, the expense of gathering documents and data from a large number of files and the intrusion of defense counsel's prying eyes on the prosecution's inner workings are the principal injuries to be avoided. Once the resources have been spent and the privacy of the office breached, an actual evidentiary hearing would be a relatively minor additional intrusion.

For these reasons, a single standard should apply for both discovery and an evidentiary hearing. Further, the Ninth Circuit's earlier opinion was correct when it said that "some evidence" is not enough, and a "high threshold" is necessary. *United States v. Bourgeois*, 964 F. 2d 935, 939 (1992). The phrasing of *Franks and Wade*, that the showing be "substantial," comes closer to the mark than the confusing term "colorable" and should be adopted.

V. The showing in the present case is insufficient.

The showing in the present case requires only brief discussion. Previous attacks upon crack sentencing laws have stressed that the bulk of the violators of this particular drug law are black. The Minnesota Supreme Court sustained an equal protection challenge to the constitutionality of similar state law on this basis. *State v. Russell*, 477 N. W. 2d 886, 887 (1991). The *Russell* court noted that 96.6 percent of cocaine base defendants in Minnesota were black, while 79.6 percent of powder cocaine defendants were white. Similar proportions have been found in other cases. See *United States v. Simmons*, 964 F. 2d 763, 767 (CA8 1992); Shein, Racial Disparity in "Crack" Cocaine Sentencing, 8 Crim. Just. 28, 32 (Summer 1993).

Despite all this, the Court of Appeals majority in the present case states that any assumption that the defense's statistics in this

case represent demographic reality rather than racist policy "would be accepting unwarranted racial stereotypes." *United States v. Armstrong*, 48 F. 3d 1508, 1517, n. 6 (CA9 1995). This statement is the rhetorical equivalent of chemical warfare. With neither precedent nor experience to support its position, the majority tries to poison the dissent's ground by branding it "racist." This ploy is as unconvincing as it is regrettable.

A commitment to racial equality does not require that we blind ourselves to racial reality. In truth, there is nothing unusual about gangs of a particular ethnic group dominating a particular segment of organized crime in a given region at a given time. The Mafia, the tongs, and the Nuestra Familia have been comprised primarily, if not exclusively, of people of one ethnic group. See A. Bequai, *Organized Crime* 19-25 (1979). When such a gang or group of gangs is successful enough to dominate a "racket" for some period, then it follows that most prosecutions for that crime in that period will be of defendants of one ethnic group.

The Sentencing Commission describes three types of distributors for cocaine: "freelance individuals, relatively small, non-gang groups, and relatively large, urban street gangs." USSC Report, *supra*, at 76. Beyond question, it would be a perfectly proper exercise of prosecutorial discretion to focus the most intense efforts on groups rather than individuals and on large groups rather than small groups. Who are the large groups in the Los Angeles area? "The Crips and the Bloods are rival gangs in Los Angeles whose membership comprises primarily Black youth." *Id.*, at 80.

The Court of Appeals majority essentially proceeds upon a presumption of homogeneity. We are supposed to assume that all crime is spread exactly evenly through all ethnic groups until the government shoulders the burden of proving otherwise. *Armstrong*, *supra*, 48 F. 3d, at 1517, n. 6. Real life is not like that.

This Court has held that the use of a presumption which is not grounded in reality is so grossly unfair that it violates the Due Process Clause. *Leary v. United States*, 395 U. S. 6, 36 (1969). The people are also entitled to due process of law. *Stein v. New York*, 346 U. S. 156, 197 (1953), overruled on other

grounds in *Jackson v. Denno*, 378 U. S. 368, 391 (1964). A presumption of homogeneity in a country we know is heterogeneous,⁸ particularly in its criminal gangs, is fundamentally unfair to the people and denies them due process of law.

For this reason, a showing of discriminatory impact must include a comparison group of people who received more lenient treatment and who do not differ from the allegedly targeted group on any legitimate basis for differential treatment. No such showing was made in the present case.

The Court of Appeals majority gave the defense complete control over which data set would be used for the threshold showing. The Federal Public Defender's Office chose its own cases closed in 1991 as the study group. When the government responded with a broader group, the majority dismissed the response, saying "None of the cases [shown by the government], however, fell within the parameters of the [defense's] study." 48 F. 3d, at 1517. As the dissent notes, it is quite possible that various parameters were tried and the set that gave the most favorable numbers for the argument was chosen. *Id.*, at 1530, n. 13. Random variation, especially in sets as small as 24 cases, makes such dishonesty far too easy.

The additional declarations made to "bolster" the initial statistical study, 48 F. 3d, at 1511, were extraordinarily weak. First there was counsel's declaration of rank hearsay from a halfway house coordinator concerning his experience in treating addicts. *Id.*, at 1511-1512. Because federal policy is targeted at distributors rather than users and lower-level sellers, see P. L. 104-38, § 2(a)(1)(B) (Oct. 30, 1995), the population of addicts is utterly irrelevant. To the extent the halfway house coordinator opined on the population of dealers, *Armstrong*, 48 F. 3d, at 1512, even if he had the expertise to make such a statement, it does not distinguish low-level individuals from more organized operations. The defense attorney's declaration of conversations and conclusions about "cocaine base offenses," *ibid.*, does not show that the state cases are comparable on all legitimate

8. See *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 266, n. 15 (1977).

criteria, or indeed on any criterion other than a sweeping category of offenses.

Can statistics alone ever make a case of discriminatory prosecution? *Wayte v. United States*, 470 U. S. 598, 609 (1985) cites *Arlington Heights*, *supra*. That case states the answer.

"Sometimes a clear pattern, *unexplainable* on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); [citations]; *Gomillion v. Lightfoot*, 364 U. S. 339 (1960). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo* impact alone is *not* determinative, and the Court must look to other evidence." 429 U. S., at 266 (emphasis added; footnotes omitted).

Yick Wo did not simply show that all 200 of the wooden laundry petitions from Chinese applicants were denied; he also showed that all but one of the applications by white persons were granted. 118 U. S., at 359. *Gomillion* did not simply show that the Tuskegee gerrymander excluded all but four or five of the 400 black voters; he also showed it included all the white voters. 364 U. S., at 341.

Defendant's showing clearly does not come anywhere close to these. However, the showing is not offered as a proven case but rather as the basis for discovery. If a disparity as stark as *Yick Wo* or *Gomillion* is required for *proof* of discriminatory intent, how stark of a disparity will suffice for a "substantial preliminary showing"?

For the preliminary showing to serve its function, defendants must be required to show different treatment of similarly situated groups and to substantially (not conclusively) negate the principal valid reasons why the groups might be treated differently.

First, the allegedly disadvantaged sample group must be identified. Defendants should explain why this group was selected, *e.g.*, because records of this group were available and a comparison pool was available. It would also be helpful to state what other pools were considered, why they were rejected, and any preliminary results from them. This would help negate suspicion that the pool was chosen because it coincidentally

yielded the numbers most favorable to the argument. Cf. *Armstrong, supra*, 48 F. 3d, at 1530, n. 13 (dissenting opinion).

Second, a comparison pool is essential. Reliance on general population statistics and an unsupported presumption of homogeneity would be fundamentally unfair to the people. See *ante*, at 19.

Third, the two pools must be shown to be comparable on the major legitimate reasons for the charging decision, including government knowledge of the offense, strength of the case,⁹ quantity in drug cases, prior criminal history, firearm use or other violence, and level of organization.

Making a substantial showing of discriminatory prosecution through statistics alone is a daunting task, to be sure. Yet the complexity of the prosecution decision, see *Wayte, supra*, 470 U. S., at 607, renders any lesser showing void of probative value. For example, in *McCleskey v. Zant*, 580 F. Supp. 338 (ND Ga. 1984), the model that supposedly showed "a statistically significant race of the victim effect at work on the prosecutor's decision-making" was, in reality, "totally invalid for it contain[ed] no variable for strength of the evidence" *Id.*, at 367 (emphasis added). Another study in the case did contain data on strength of the evidence. *Id.*, at 355. That study showed "no statistically significant race of the victim effect . . . in the prosecutor's decision" *Id.*, at 367.¹⁰ Statistical studies with major variables missing simply show nothing.

The very few defendants who have actually made a preliminary showing of discriminatory prosecution have typically done so with direct evidence from employees or former employees of

9. This is generally not a problem in drug possession cases unless there is a Fourth Amendment issue.

10. On appeal, the Eleventh Circuit and this Court chose to decide the case on the facts alleged, rather than the facts found by the trier of fact. *McCleskey v. Kemp*, 481 U. S. 279, 289, 291, n. 7 (1987). That departure from normal appellate procedure has led to the widespread but mistaken belief that Baldus had proved his statistical case. See *Callins v. Collins*, 127 L. Ed. 2d 435, 445, 114 S. Ct. 1127, 1135 (1994) (Blackmun, J., dissenting) (describing Baldus study as "highly reliable" and "staggering evidence").

the government. See *United States v. Adams*, 870 F. 2d 1140, 1144 (CA6 1989); *United States v. P. H. E., Inc.*, 965 F. 2d 848, 851 (CA10 1992). As a practical matter, defendants seeking to make discriminatory prosecution claims would generally be wise to invest in some old-fashioned detective work, rather than relying solely on statistics. Making even a preliminary case on numbers alone is difficult enough that some statements from present or former insiders will usually be necessary.

The need for evidence beyond numbers presents a significant hurdle, but not an impossible one. Tolerance for intolerance is vastly lower in America today than it was in the days of *Yick Wo* or *Gomillion*. Diversity within prosecuting offices is far greater. If a racist conspiracy were truly being perpetrated over an extended period by a U. S. Attorney's Office, it is probable that some employee or former employee would eventually be willing to come forward and expose it. See *ante*, at 17. If such showings are rare, it is probably because such conspiracies are rare.¹¹

We do not pretend that such evidence will *always* be available. A threshold showing requirement raises the risk that some discriminatory conspiracies might remain covered up. Any system of criminal justice necessarily tolerates some risk. For example, the standard of proof beyond a reasonable doubt, rather than proof beyond *any* doubt, creates some risk of conviction of an innocent person. The conviction of one guilty person while other guilty persons go free, even if discriminatory, is a matter of far lesser magnitude. We cannot afford to pursue thousands of phantoms to catch one real violation. A substantial showing requirement will limit litigation of this issue to cases where there is a significant possibility of a real violation.

The showing in the present case is far from "substantial," having no comparison group for statistics and no direct evidence of discriminatory intent. Discovery should not have been ordered.

11. If there is something less than racist conspiracy, such as a race-neutral policy with an unintended disparate impact, that does not constitute a defense to prosecution. See *Wayte, supra*, 470 U. S., at 610.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

December, 1995

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

Supreme Court, U.S.

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No. 95-157

UNITED STATES OF AMERICA,

PETITIONER,

v.

CHRISTOPHER LEE ARMSTRONG, ET AL.,

RESPONDENT.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS AS AMICUS
CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether substantial evidence exists to show gross disproportionality in charging African-Americans with crack offenses supporting a claim of unconstitutional selective prosecution.

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
<p>SUBSTANTIAL EVIDENCE EXISTS TO SHOW GROSS DISPROPORTIONALITY IN CHARGING AFRICAN- AMERICANS WITH CRACK OFFENSES SUPPORTING A CLAIM OF UNCONSTITUTIONAL SELECTIVE PROSECUTION</p>	
I. THE CONTEXT OF CRACK PROSECUTIONS	5
A. CRACK COCAINE AND POWDER COCAINE ARE ESSENTIALLY THE SAME DRUG	5
B. THE DIFFERENCES IN SENTENCING	6
C. THE RACIAL DISPARITIES IN PROSECUTIONS	11
D. RESPONSES TO ATTACKS ON CRACK PROSECUTIONS AND SENTENCING	18
II. THE EVIDENCE OF SELECTIVE PROSECUTION IS MORE THAN SUFFICIENT TO REQUIRE DISCOVERY OF THE PROCESS AND REASONS FOR PROSECUTORIAL DECISIONS	20
CONCLUSION	24

TABLE OF AUTHORITIES

Cases:	Page
<u>Attorney General of the United States v.</u>	
<u>Irish People, Inc.</u> , 684 F.2d 928, 948	
(D.C. Cir. 1982)	21
<u>Gomillion v. Lightfoot</u> , 346 U.S. 339, 341	
(1960)	24
<u>In re Grand Jury</u> , 619 F.2d 1022, 1030	
(3d Cir. 1980)	21
<u>St. Germain v. United States</u> , 840 F.2d 1087,	
1095 (2d Cir. 1985)	21
<u>United States v. Adams</u> , 870 F.2d 1140, 1146	
(6th Cir. 1989)	21
<u>United States v. Armstrong</u> , 48 F.3d 1508,	
1512 (9th Cir. 1995) (en banc)	21
<u>United States v. Armstrong</u> , 21 F.3d 1431,	
1439 (9th Cir. 1994)	20
<u>United States v. Barnes</u> , CR-92-046-WFN	
(E.D. Wash.)	13
<u>United States v. Clary</u> , 846 F. Supp. 768	
(E.D. Mo. 1994), <u>rev'd</u> , 34 F.3d 709	
(8th Cir. 1994)	19,20
<u>United States v. Davis</u> , 864 F. Supp. 1303	
(N.D. Ga. 1994)	6,19
<u>United States v. Dumas</u> , CR-93-038-FVS	
(E.D. Wash.)	13
<u>United States v. Dumas</u> , 64 F.3d 1427,	
1431 (9th Cir. 1995)	18,19,20
<u>United States v. Ford</u> , 94-CR-124-2	
(D. Col.)	15
<u>United States v. Fraiser</u> , CR-93-039-WFN	
(E.D. Wash.)	13
<u>United States v. Gordon</u> , 817 F.2d 1538,	
1540 (11th Cir. 1988)	21
<u>United States v. Greenwood</u> , 796 F.2d 49,	
52 (4th Cir. 1986)	21
<u>United States v. Heidecke</u> , 900 F.2d 1155,	
1159 (7th Cir. 1990)	21

<u>United States v. Hickman</u> , CR-93-14021 (S.D. Fla.)	17
<u>United States v. Johnson</u> , 577 F.2d 1304, 1308 (5th Cir. 1978)	21
<u>United States v. Lee</u> , 957 F.2d 778, 783 (10th Cir.), <u>cert. denied</u> , 113 S. Ct. 475 (1992)	10
<u>United States v. Osburn</u> , 955 F.2d 1500, 1507 (11th Cir.), <u>cert. denied</u> , 113 S. Ct. (1992)	10
<u>United States v. P.H.E., Inc.</u> , 956 F.2d 848 860 (10th Cir. 1992)	21
<u>United States v. Parham</u> , 16 F.3d 844, 847 (8th Cir. 1994)	21
<u>United States v. Penagarican-Soler</u> , 911 F.2d 833, 838 (1st Cir. 1990)	21
<u>United States v. Reese</u> , CR-93-817 (S.D. Cal.)	14
<u>United States v. Savinovich</u> , 845 F.2d 834, 839 (9th Cir.), <u>cert. denied</u> , 484 U.S. 1058 (1989)	10
<u>United States v. Turner</u> , 901 F. Supp. 1491, 1494 (C.D. Cal. 1995)	16,18
<u>United States v. Willis</u> , 967 F.2d 1220, 1226 (8th Cir. 1992)	9

Statutes:

21 U.S.C. §841(b)(1)(A)	passim
21 U.S.C. §841(b)(1)(B)	passim
21 U.S.C. §844	6

United States Sentencing Guidelines:

§2D1.1(c)	6
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BRIEF FOR THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS AS AMICUS
CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit organization whose membership consists of more than 8,000 lawyers and more than 28,000 affiliate members, including citizens of every state. The lawyer members of NACDL include advocates, law professors, and judges. NACDL is the only private bar organization working on behalf of public and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates.

NACDL is dedicated to the preservation and improvement of our adversary system of justice. Among NACDL's stated objectives are the promotion of the proper administration of criminal justice, the protection of individual rights, and the improvement of criminal law, its practices, and its procedures.

NACDL has appeared as amicus curiae in many cases addressing issues arising out of the administration of federal criminal law, including issues implicating due process, equal protection, Eighth Amendment concerns, discovery procedures, and sentencing matters. NACDL believes the issue presented here is of great significance to the criminal justice system because the decision below provides for basic discovery procedures and remedies for the failure to abide by those procedures, which in turn aid in ensuring protection of important constitutional rights including due process and equal protection. NACDL believes that the Court will benefit from its views on this important issue.

Petitioner and respondents have consented to the filing of this brief and letters reflecting those consents will be lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

The issue before the Court may narrowly be viewed as whether the court of appeals was correct in affirming the district court's order for discovery and dismissal of the indictment upon the government's refusal to comply. Resolution of that issue, however, must consider the larger context of this nation's drug laws and their enforcement. Defendants before the Court were charged with offenses involving crack cocaine. The structure of law enforcement, prosecution, and sentencing in crack cases must be considered to reach a just resolution.

The severe statutory penalties for crack cocaine are not supported by scientific or social realities. The penalties for crack offenses are substantially more severe than for other drug offenses, including those involving powder cocaine. Combined with the misperception that crack offenses are committed primarily by African-Americans, the end result is that investigative and prosecutorial efforts impermissibly target African-Americans.

Crack is a form of cocaine produced by combining cocaine powder, water and some agent such as baking soda. When heated the cocaine crystallizes into "rocks" which are administered by smoking. The production process takes only a few minutes. Evidence indicates that, although there are some differences in the physiological effects of various means of ingesting cocaine (e.g., smoking, snorting, intravenous), the effects, both in terms of duration and potency, are essentially similar.

Despite the similarities of crack and powder cocaine, crack is punished 100 times more severely than powder. The misperceptions that crack offenses are more serious than powder cocaine offenses and that African-Americans commit crack offenses to a significantly greater extent than whites have several repercussions. More than 90% of federal crack defendants are African-American. When coupled with the disparity in applicable sentencing statutes and guidelines, the end result is that African-Americans are sentenced to substantially longer terms of imprisonment for offenses involving what is essentially the same drug: cocaine.

Defendants across the country have mounted various attacks on the statute, guidelines, and practices of law enforcement and prosecutors. Although some district courts have ruled in favor of

defendants, the courts of appeals, applying a rational basis analysis, have uniformly held that the prosecutorial decisions and the sentencing statutes do not violate the Constitution. With respect to claims of selective enforcement and prosecution in violation of equal protection and due process, courts have consistently concluded that defendants have failed to present evidence of race-based decisions by prosecutors.

Given the climate created by the disparate sentencing treatment of crack and cocaine powder and the disproportionate number of African-Americans prosecuted compared to whites, a colorable claim of improper prosecutorial decisions has been made. Nothing more is, or should be, required for discovery relating to the processes by which these decisions are made. This is particularly true given that the government holds the key to the very evidence the various courts have held to be missing.

ARGUMENT

SUBSTANTIAL EVIDENCE EXISTS TO SHOW GROSS DISPROPORTIONALITY IN CHARGING AFRICAN-AMERICANS WITH CRACK OFFENSES SUPPORTING A CLAIM OF UNCONSTITUTIONAL SELECTIVE PROSECUTION.

Crack cocaine and powder cocaine are essentially the same drug, but the penalties for crack offenses are significantly harsher. African-Americans are disproportionately represented in federal cases involving crack offenses. The statistical evidence of disproportionate prosecutions is sufficient to require discovery of the process by which decisions to prosecute are made.

I. THE CONTEXT OF CRACK PROSECUTIONS

A. CRACK COCAINE AND POWDER COCAINE ARE ESSENTIALLY THE SAME DRUG.

Although the terms "crack" and "cocaine base" are often used interchangeably, crack is in fact only one form of cocaine base, which in turn is only one form of cocaine. See, e.g., United States Sentencing Commission Special Report to the Congress: Cocaine and Federal Sentencing Policy, Feb. 1995 at 12-15 [hereinafter Special Report]. Powder cocaine is produced by dissolving coca paste from coca leaves in hydrochloric acid and water. Potassium salt causes undesired substances to solidify and they are then removed. Finally, ammonia is added to separate the powder cocaine from the solution. The result is cocaine hydrochloride.

Production of cocaine base involves removing the salts added during powder production and returning the substance to essentially a form similar to the coca paste. One method is known as freebase. The powder is dissolved in an alkaloid solution. Various solvents, often ether, are added, producing the solid cocaine base. Because of its complex and dangerous production, freebasing has been largely abandoned.

Crack cocaine is a form of cocaine base that is cheaper, easier, and safer to produce than freebase. Powder cocaine is dissolved in a solution of water and baking soda and boiled. A solid substance forms, which is allowed to dry and then broken into "rocks". The "rocks" are then distributed. Dealers often keep the drug in its powder form and convert it to crack only shortly before distribution.

Powder cocaine is administered by injection, insufflation (snorting), or ingestion. Crack cocaine is used by inhalation (smoking). The major

difference in the effects of the two forms of cocaine, powder and crack, is the speed of physiological and psychotropic effects. Smoking crack results in much more rapid entry to the brain and subsequent effects than does the use of powder cocaine. The type, duration and quality of the effects are similar. Special Report at 22-29 & Table 2.¹

B. THE DIFFERENCES IN SENTENCING

1. Despite the evidence that crack cocaine and powder cocaine are essentially the same drug, Congress and the Sentencing Commission continue to maintain penalties for crack that are grossly disproportionate to powder penalties. Federal law mandates a minimum term of imprisonment of ten years for a violation involving five kilograms of powder. 21 U.S.C. §841(b)(1)(A). Only 50 grams of crack trigger the ten-year mandatory minimum. Similarly 21 U.S.C. §841(b)(1)(B) provides for a five-year minimum term of imprisonment for 500 grams of powder cocaine, but only 5 grams of crack. A five-year mandatory minimum also applies to simple possession of 5 grams of crack cocaine. 21 U.S.C. §844. Section 844 also provides a five-year mandatory minimum penalty for possessing lesser quantities with prior convictions.²

Because the Sentencing Guidelines are driven by the statutory penalties for controlled substances, the guidelines also treat quantities of crack the same as 100 times a similar quantity of powder

¹One district court found the substances, crack and powder, chemically identical and that the different penalties were thus not supported. United States v. Davis, 846 F. Supp. 1303 (N.D. Ga. 1994).

²Other drugs carry a 15-day mandatory minimum for simple possession for an offender who has a prior controlled substance conviction.

cocaine. See U.S.S.G. § 2D1.1(c). For example, a base offense level of 32 applies for 5 to 15 kilograms of powder cocaine. Only 50 to 150 grams of crack results in the same offense level.

Thus, two defendants with the same quantity of cocaine, one with powder and one with crack, will receive significantly different sentences. A defendant with 50 grams of powder cocaine will face no statutory mandatory minimum sentence while a defendant with 50 grams of crack will face a mandatory minimum ten-year term of incarceration. 21 U.S.C. § 841(b)(1)(A). Under the United States Sentencing Guidelines, the base offense level for the powder offender would be 16, but that of the crack offender would be 32. Assuming a Criminal History II for each offender and no mitigating or aggravating factors that would adjust the offense level, the powder offender would have a sentencing range of 24-30 months, while the crack offender would face 135-168 months in prison.

2. These penalties, with the 100 to 1 ratio, were born in the Anti-Drug Abuse Act of 1986. At the time, Congress essentially reacted to news stories of crack distribution in the inner cities and "crack babies" as well as unverified and exaggerated reports concerning the effects of crack and the alleged violence arising from its use. See Hearings before the United States Sentencing Commission on Proposed Guidelines Amendments for Public Comment, Testimony of Eric E. Sterling, President of the Criminal Justice Policy Foundation (Mar. 22, 1993) (process described as "frenzied" and "extraordinary") [hereinafter "Sterling Testimony"]. See also 132 Cong. Rec. S13748 (remarks of Sen. Evans) ("the action over there resembled a Congressional lynch mob more than it did careful legislation").

Typically, such major legislation on serious crime issues would be "referred to a subcommittee, and hearings [would be] held on the bills." Additionally, comments would be invited from "the Administration, the Judicial Conference, and organizations that have expertise on the issue." Instead, the 1986 Act was passed a mere five weeks after introduction with only one brief committee hearing. Sterling Testimony; "Crack" Cocaine: Hearings Before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 99th Cong. 2d Sess. (July 15, 1986). The original proposal offered by the Democrats, in an effort to look "tough on crime," called for a 50 to 1 sentencing ratio between crack and powder cocaine. See H.R. 5394; Sterling Testimony at 4. But, not to be outdone, the Republicans "arbitrarily doubled [the ratio] simply to symbolize redoubled congressional seriousness." Sterling Testimony at 4.

3. In testimony before the United States Sentencing Commission, several witnesses stated the 100 to 1 ratio was not supported by the nature of crack cocaine production and distribution, nor by the pharmacological nature of the drug. See, e.g., U.S. Sentencing Commission, Hearing on Crack Cocaine, Nov. 9, 1993, at 38 [hereinafter "Commission Hearings"] (testimony of Sergeant Brennan) ("[y]ou don't see very much powder on the street at all, no. The powder is made into crack and distributed on the street. . . . It all comes from the same source: the powder."); (testimony of Jerome Skolnick) ("dealers . . . are dealing in powder cocaine. So that distinction just is not a sensible distinction").

Furthermore, crack has never been shown to cause the user to become more prone to violence than powder cocaine. See Commission Hearings at 52 (testimony of Dr. Belenko) ("there is no clear

evidence . . . that the emergence of crack had any kind of gross effect on violent crime rate"). See also Hope Corman, Theodore Joyce and Naci Mocan, "Homicide and Crack in New York City," Searching For Alternatives: Drug-Control Policy in the United States (Hoover Institution Press 1991) at 112, 134 (study of correlation between violent crime and crack cocaine found "only weak evidence of any significant upturn" in violent crimes and concluded that crack is conveniently used to cover up more fundamental causes of violence). "Thus media and public fears of a direct causal relationship between crack and other crimes do not seem confirmed by empirical data." Commission Hearings at 59 (testimony of Dr. Belenko).

In sum, "Congress had no hard evidence before it to support the contention that crack is 100 times more potent or dangerous than powder cocaine." United States v. Willis, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring); see also 132 Cong. Rec. S9788 (daily ed. July 29, 1986) ("the dividing line between crack and powder cocaine is indistinct and arbitrary"). As one doctor concluded, "it doesn't make sense to punish a molecule with a little twist so much more severely than the same molecule in a different scenario[.]. . . and the potential bias for punishing crack cocaine differently than cocaine hydrochloride is a bias towards inner-city America." Commission Hearings at 179 (testimony of Dr. Robert S. Hoffman).

The Sentencing Commission concluded that the 100 to 1 ratio of crack to powder cocaine is too great. See Special Report, Executive Summary at p. I. The Commission found that neither powder nor crack cocaine are physically addictive but both are psychologically addictive. Id. at 181. Most cocaine-related emergency room admissions are related to smoking crack, but most deaths result from injection of powder. Id. at 184. Of

particular interest is the finding that any difference in the association of crack with violent crimes is "systemic." That is, the crime is related to the methods and areas of marketing and distribution and not to the effects of usage. Id. at vii-ix, 185.'

4. The 100 to 1 ratio flies in the face of the general policies of drug enforcement. Courts have found that Congress intended a "market approach" to punishment for drug offenses. This approach focuses "on major traffickers responsible for dealing in very large quantities." United States v. Osburn, 955 F.2d 1500, 1507 (11th Cir.), cert. denied, 113 S. Ct. 223 (1992); see also United States v. Lee, 957 F.2d 778, 783 (10th Cir.), cert. denied, 113 S. Ct. 475 (1992); United States v. Savinovich, 845 F.2d 834, 839 (9th Cir.), cert. denied, 484 U.S. 1058 (1989).

In theory, this "market approach" should punish more severely not only offenders dealing in large quantities, but also those dealing in controlled substances with greater monetary value. However, because the methods of distributing crack and the practices of law enforcement result in prosecution of relatively small-scale street dealers who nonetheless receive draconian sentences, this vaunted market approach is turned on its head.

¹Congress chose to maintain the disparities even in light of the scientific evidence that the drugs are essentially the same and growing evidence that the sentencing scheme unfairly punishes African-Americans more severely than whites. After extensive hearings and debate, the United States Sentencing Commission proposed an amendment to the Sentencing Guidelines that would eliminate the distinction between crack and powder cocaine for purposes of establishing offense levels. See "Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary," Amend. No. 5, submitted to Congress May 1, 1995. On October 30, 1995, Congress rejected the amendment. P.L. 104-38, Oct. 30, 1995, 109 Stat. 334.

Not only are the quantities of crack often small, the value in comparison with other drugs is nominal. A few dollars worth of crack will trigger a long sentence. Using data from the United States Drug Enforcement Agency, the Sentencing Commission determined that crack has a street value of approximately \$38.33 per one-third gram (\$105 per gram) compared to \$107 per gram of powder cocaine. Under the sentencing guidelines, \$5,750 worth of crack results in an offense level 32, but \$535,000 worth of powder cocaine is required to reach that offense level. A defendant would have to have over eight million dollars worth of marijuana, with a street value of \$237.57 per ounce, to have a base offense level of 32. Other offense levels require similarly disproportionate values. Special Report at 173, Table 19.

Using the DEA comparative street values, \$535,000 worth of powder cocaine and \$5,750 worth of crack are the quantities (five kilograms of powder and 50 grams of crack) that trigger the mandatory ten-year prison terms under 21 U.S.C. § 841(b)(1)(A). The sentencing scheme for cocaine is thus unrelated to the profitability of trafficking as well as to the lack of significantly different properties in its various forms.

C. THE RACIAL DISPARITIES IN PROSECUTIONS

1. Despite the fact that African-Americans total 12% of this nation's population, 92% of federal crack prosecutions nationwide have involved African-American defendants. See 1992 U.S. Sentencing Commission Monitoring Data Files (April-July 1992); Special Report, Ch. 7. Figures 1 and 2 compare African-Americans in the general population and those charged with crack offenses, infra p. 12.

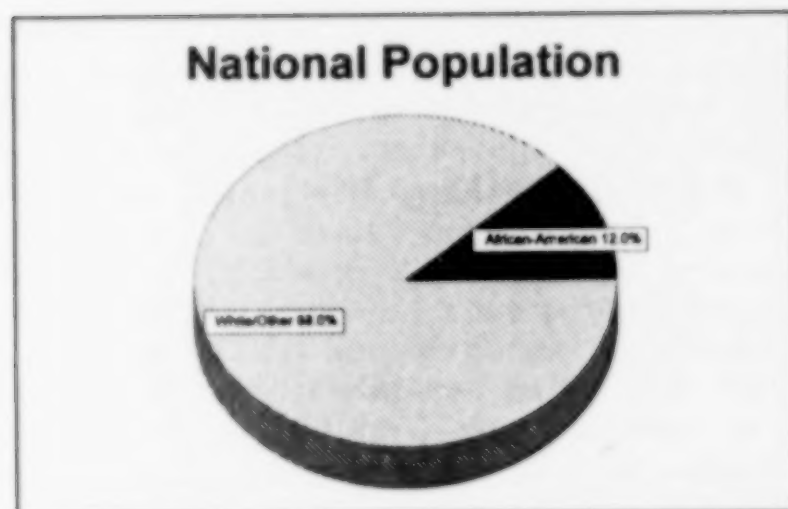


Figure 1

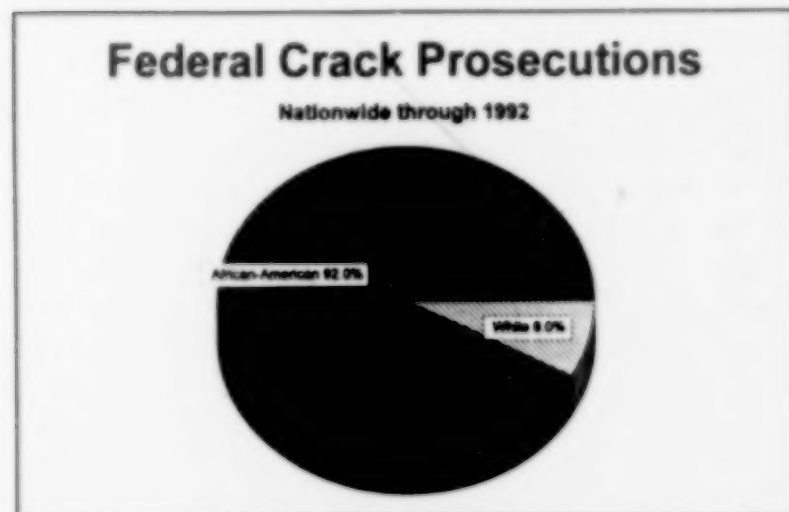


FIGURE 2

The racial disparities in prosecutions cannot be explained by the argument that crack is "an African-American drug" in light of the fact that whites use crack in significant numbers. One survey concluded that 65% of crack users were white. Special Report at 39.

Large scale dealers, both black and white, keep cocaine in powder form until it is ready to be sold.

See, e.g., Commission Hearings at 38 (testimony of Sergeant Brennan) ("[y]ou don't see very much powder on the street at all, no. The powder is made into crack and distributed on the street. . . . It all comes from the same source; the powder."). It is the small scale street dealer, not the large scale dealer, whether Caucasian or African-American, who is arrested on the street. Id.

The use of crack cocaine does not depend on race, but rather on place of residence and neighborhood-level social and environmental conditions. When such conditions are held constant, the pattern of crack use does not differ significantly with race. Special Report at 39.

The national statistics for federal crack prosecutions are mirrored by prosecutions in individual districts. The Eastern District of Washington provides a stark example. In that district, African-Americans comprise approximately one percent of the population, but the percentage of African-American federal crack defendants continues to reflect the national percentage of over 90%. Of 43 crack prosecutions from 1992 to 1994, 39, or [90.7%], were African-American. Only four, or 9.3%, were white. Figure 3, infra p. 14, charts the racial composition of federally prosecuted crack offenders in the Eastern District of Washington.⁴

⁴These statistics were submitted to the District Court during the course of proceedings in United States v. Barnes, CR-92-046-WFN (E.D. Wash.), United States v. Dumas, CR-93-038-FVS (E.D. Wash.), and United States v. Fraiser, CR-93-039-WFN (E.D. Wash.). Each of the defendants in these cases argued the statutes and guidelines governing crack are unconstitutional as enacted and that law enforcement and prosecutors selectively select defendants on a racial basis.

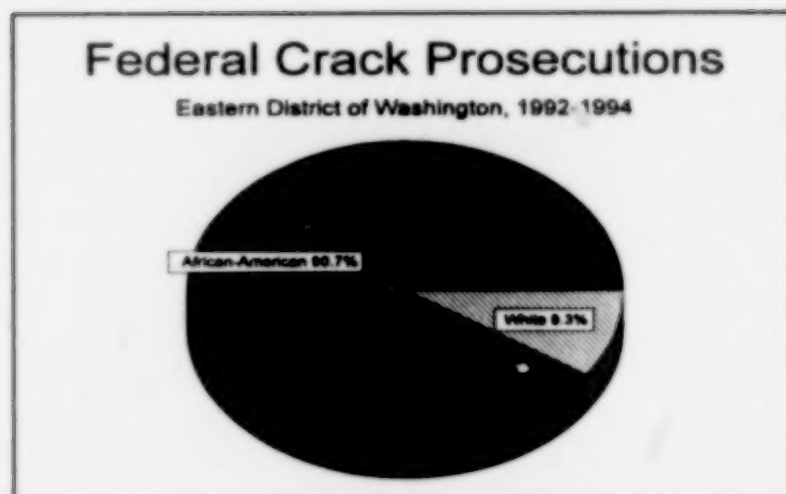


FIGURE 3

Federal prosecutions in other districts reflect that similarly disproportionate numbers of African-Americans are prosecuted for crack offenses. Of 193 prosecutions in the Southern District of California from 1988 to 1993, 168, or 87.1%, of crack defendants were African-American. Cubans of African descent accounted for 12, or 6.2%, of the defendants. One defendant, 0.5%, was Jamaican of African descent. Hispanics numbered 11, or 5.7%. Minorities thus totaled 99.5% of the defendants, while only one defendant, 0.5% of the total was white.⁵ The statistics from the Southern District of California are shown in Figure 4, *infra* p. 15.

⁵Data submitted in United States v. Reese, CR-93-817 (S.D. Cal.). As in the cases from the Eastern District of Washington, the defendants in Reese, argued, *inter alia*, that crack statutes were selectively prosecuted.

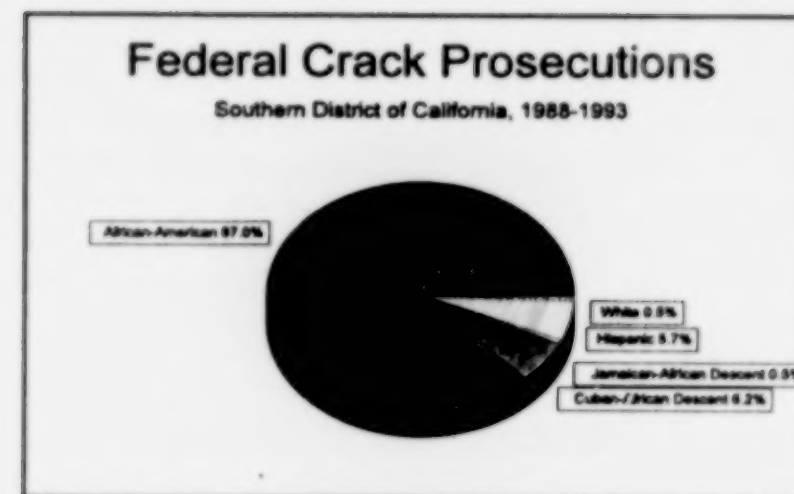


FIGURE 4

In the District of Colorado, of 85 federal crack defendants, 72, or 84.7% were African-American; 6, or 7.1%, were white; and 7, or 8.2% were Hispanic, other, or of unknown race.⁶ See Figure 5.

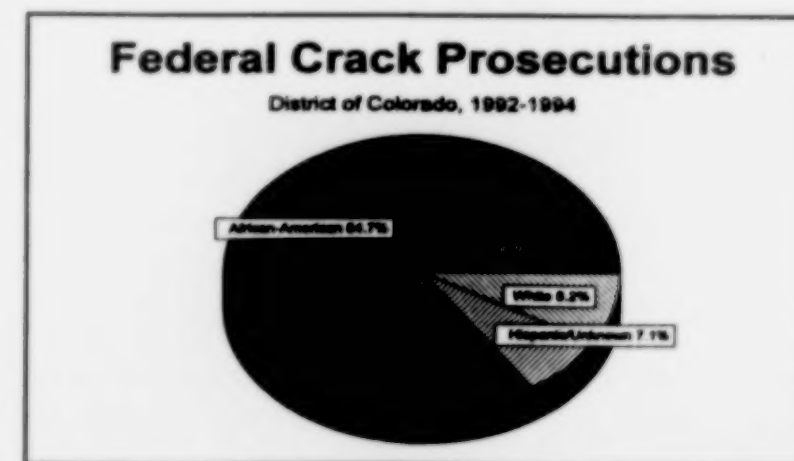


Figure 5

⁶These statistics were submitted in United States v. Ford, 94-CR-124-2 (D. Col.).

Possibly more relevant here are additional statistics in the Central District of California, the same district where the case before the Court arose.⁷ Prosecution statistics showed that of 149 defendants who were charged as part of crack cocaine sting operations, 109 (74.7%) were African-American, 28 (19.2%) were Hispanic, 8 (5.5%) were Asian and 1 (0.7%) was white. See Figure 6.

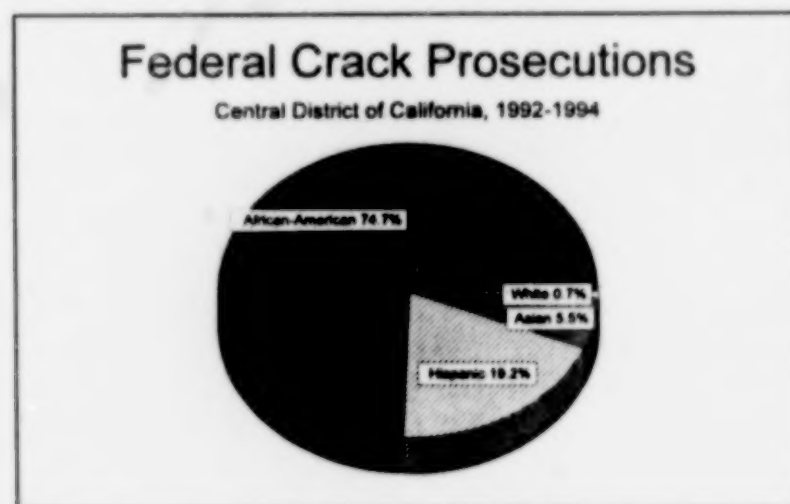


Figure 6

Statistics from two state jurisdictions support the conclusion that more whites are available for prosecution than are prosecuted in federal court. In the Eastern District of Washington, data showed that in state prosecutions in Spokane County, the most populous county in the district, whites accounted for 82, or 28.9%, of 284 crack prosecutions, while African-Americans comprised 193, or 68.0% of the defendants.⁸ This data is summarized in Figure 7, *infra* p. 17.

⁷This data is taken from *United States v. Turner*, 901 F. Supp. 1491 (C.D. Cal. 1995).

⁸See *supra* at n.4.

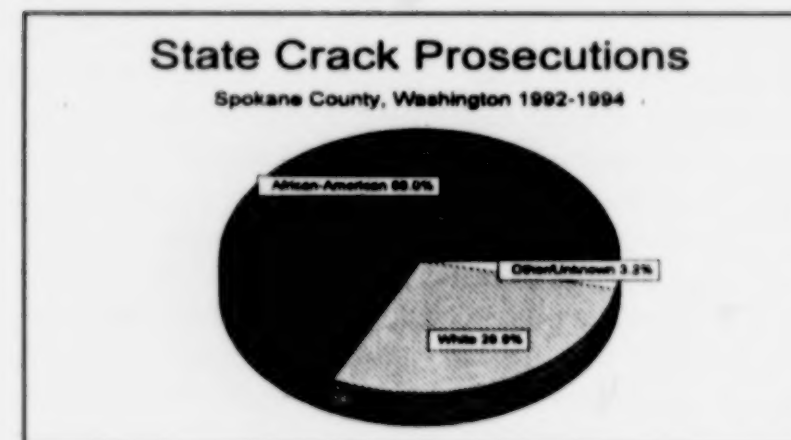


Figure 7

Similarly, as shown in Figure 8, 552, or 19.6%, of 2661 crack defendants in state courts within the Southern District of Florida were white.⁹

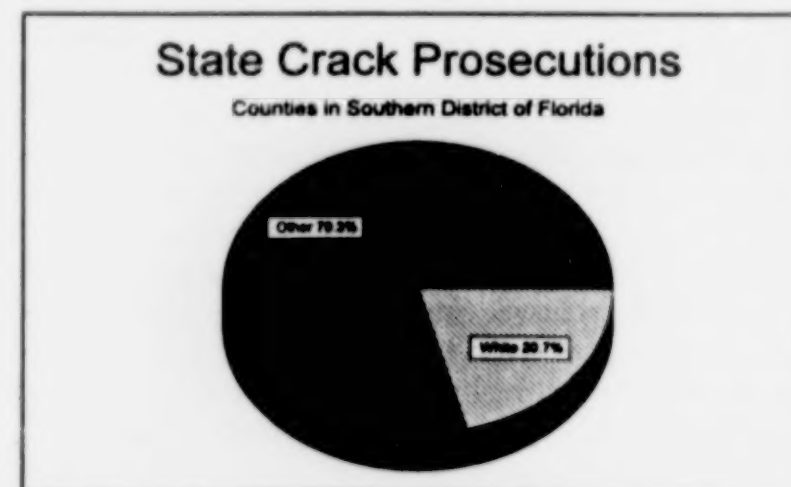


Figure 8

Obviously, crack offenses are not the province of African-Americans to the extent indicated by federal prosecutions.

⁹This data was filed in *United States v. Hickman*, CR-93-14021 (S.D. Fla.).

This federal and state data shows the marked disproportionality with which African-Americans are prosecuted, convicted and sentenced for crack offenses in federal court. Attempts to explain the disparity between population figures and prosecutions by claims that African-Americans commit crack offenses more than whites cannot explain the gross differences. This is particularly true in light of the evidence that whites commit crack offenses in significant numbers, certainly far greater than the federal prosecution data would indicate.

2. In some cases, the government has attempted to explain the statistical disparities in the racial makeup of federal crack defendants by stating that several criteria are involved in decisions on whether to prosecute federally. According to the government, these criteria include quantity, a defendant's gang membership or affiliation, and whether firearms were involved in the offense. See, e.g., United States v. Dumas, 64 F.3d 1427, 1431 (9th Cir. 1995); United States v. Turner, 901 F. Supp. 1491, 1494 (C.D. Cal. 1995). However, as noted in Turner, these factors may not be race neutral. Introduction of the "gang" factor does nothing to refute a claim of selective prosecution. Blacks are often seen as gang-affiliated on the basis of no real evidence at all. Turner, 901 F. Supp. at 1497 (gang membership is known to be race related); see also New York Times, Dec. 11, 1993, Sect.1, p. 8 ("2 of 3 Young Black Men in Denver Listed by Police as Suspected Gangsters").

D. RESPONSES TO ATTACKS ON CRACK PROSECUTIONS AND SENTENCING

Numerous defendants nationwide have attacked the crack cocaine sentencing structure. They have claimed that the statutes and guidelines are unconstitutional as enacted because they violate

equal protection, due process, and the Eighth Amendment.

Many defendants have cited the process by which the statutory penalties were enacted as evidence that a discriminatory purpose was at the foundation of the statute and that the grossly disproportionate federal prosecution rates between African-Americans and Caucasians was a foreseeable and desired effect of the legislation. See, e.g., United States v. Dumas, 64 F.3d 1427 (9th Cir. 1995); United States v. Clary, 846 F. Supp. 768 (E.D. Mo.), rev'd, 34 F.3d 709 (8th Cir. 1994).¹⁰

Additionally, many defendants have cited prosecution statistics similar to those discussed in the previous section to support arguments that investigation, arrest, and prosecution decisions are racially biased. See Part I, Section C, Figures 1-6.

These claims by various defendants have been almost universally rejected by the courts. Some district courts have ruled in favor of defendants. See United States v. Clary, 846 F. Supp. 768 (E.D. Mo. 1994) (crack penalties violate spirit of equal protection), rev'd, 34 F.3d 709 (8th Cir. 1994); United States v. Davis, 864 F. Supp. 1303 (N.D. Ga. 1994) ("cocaine base" and "cocaine" are identical and Congress established two penalties for the same

¹⁰See 132 Cong. Rec. S4670 (daily ed. April 22, 1986) ("most of the dealers, as with past trends, are black or Hispanic"). The Congressional Record regarding this legislation is replete with references to its goal of targeting minority communities through this legislation. See, e.g., Crack Cocaine: Hearing Before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 99th Cong., 2d Sess., at 58 ("the seller we see is Haitian or black"); 132 Cong. Rec. S809 (daily ed. June 20, 1986) ("the ghetto's legion of unemployed teenagers"); 132 Cong. Rec. S4670 (daily ed. April 22, 1986) ("whites rarely sell the cocaine rocks"). The assertion that whites are not involved in crack offenses is untrue. See supra, Part I, Section C.

substance). Courts of appeals have consistently rejected these claims. The courts have uniformly held that defendants have failed to meet their burden in establishing selective and discriminatory enforcement and prosecution. See, e.g., United States v. Dumas, 64 F.3d 1427 (9th Cir. 1995); United States v. Clary, 34 F.3d 709 (8th Cir. 1994). As with claims that the statute and guidelines themselves are unconstitutional, no court of appeals has held that a defendant was the victim of racially motivated selective enforcement or prosecution.

II. THE EVIDENCE OF SELECTIVE PROSECUTION IS MORE THAN SUFFICIENT TO REQUIRE DISCOVERY OF THE PROCESS AND REASONS FOR PROSECUTORIAL DECISIONS.

As discussed at Part I, Section C, supra, defendants in the instant case submitted statistical data showing a stark racial disparity in prosecutions of crack offenses in the Central District of California. In all of 1991, not one white defendant in this large district was prosecuted federally for a crack offense.

1. Courts have ruled against defendants who have brought claims of selective enforcement and prosecution, finding the claimants failed to provide sufficient proof of their claims. Here, the defendants have sought discovery in order to provide the missing evidence to support their claim. As Judge Reinhardt succinctly framed the issue in dissent in the panel opinion, later withdrawn, "If they could make such a showing without any discovery, there would be no need for discovery in the first place." United States v. Armstrong, 21 F.3d 1431, 1439 (9th Cir. 1994) (Reinhardt, J., dissenting).

A threshold issue in determining whether the discovery order was appropriately entered is the test for determining when discovery is generally

appropriately ordered. A majority of the circuits have adopted the "colorable basis" test. See, e.g., In re Grand Jury, 619 F.2d 1022, 1030 (3d Cir. 1980); United States v. Adams, 870 F.2d 1140, 1146 (6th Cir. 1989); United States v. Heidecke, 900 F.2d 1155, 1159 (7th Cir. 1990); United States v. Armstrong, 48 F.3d 1508, 1512 (9th Cir. 1995) (en banc); United States v. P.H.E., Inc., 956 F.2d 848, 860 (10th Cir. 1992); Attorney General of the United States v. Irish People, Inc., 684 F.2d 928, 948 (D.C. Cir. 1982). A colorable basis is "some evidence tending to show the essential elements of the claim." Heidecke, 900 F.2d at 1159.

Four circuits apply a stricter "prima facie showing" test. United States v. Penagarican-Soler, 911 F.2d 833, 838 (1st Cir. 1990); St. Germain v. United States, 840 F.2d 1087, 1095 (2d Cir. 1985); United States v. Johnson, 577 F.2d 1304, 1308 (5th Cir. 1978); United States v. Parham, 16 F.3d 844, 847 (8th Cir. 1994).

Finally, two circuits have employed a "non-frivolous" standard. United States v. Greenwood, 796 F.2d 49, 52 (4th Cir. 1986); United States v. Gordon, 817 F.2d 1538, 1540 (11th Cir. 1988).

A defendant in a federal case faces the many resources of the United States government. Although the principles of presumption of innocence and proof beyond a reasonable doubt guide the criminal justice system, a defendant is often placed in a position of greatly inferior power compared to that of the government. Considering the vastly differing resources of the parties and the enormous consequences to the accused, and where the data is as stark as it is here, the test for discovery orders should not place an undue onus on defendants.

The government argues that a defendant should be required to make a "substantial" or "significant"

showing of selective prosecution before discovery is permitted. In effect, the standard proposed by the government would require defendants to prove their claim before even being permitted basic discovery. The government's argument, if accepted, would allow prosecutors unfettered discretion at the same time that meaningful review of potential abuses of that discretion is effectively foreclosed.

Regardless of how the test for discovery is formulated, the overwhelming statistics submitted by the defendants in this case surpass even the most stringent of tests. The assertion by the government that there has been no showing of similarly situated defendants not being prosecuted is without merit. The statistical disparities discussed in Part I permit, if not mandate, an inference of the existence of a potential pool of defendants in which whites are represented in far greater numbers than reflected by federal crack prosecutions. Evidence that whites use and deal crack and the fact that state court prosecutions of whites are significantly greater than federal prosecutions supports the inference. This reasonable inference should shift the burden to the government to come forward, through discovery, with information concerning its investigative and prosecutorial practices.

2. To the extent that the evidence as presented does not support an inference of selective prosecution, any evidentiary gaps can be filled only by the government. Only law enforcement and prosecutors have the relevant and necessary information concerning investigations and decisions to prosecute.¹¹ Any additional relevant proof is

¹¹Only law enforcement agencies would know what communities are targeted, which suspects are arrested and which are released. Indeed, federal prosecutors may not see the number of whites investigated or arrested but not presented for federal prosecution. Nonetheless, information concerning investigations or arrests would certainly be available to

only in the hands of the government. Justice requires that the government be compelled to provide the information.

3. The government's argument that requiring discovery in crack cases would open the floodgates to claims of selective prosecution in other offenses is also without merit. First, no other offenses, whether drug-related or not, are comparable to crack offenses for which defendants face draconian punishments as compared to other offenders involved with essentially the same drug. Second, the government should not be permitted to shield itself from accountability for its decisions in one arena by the possibility that scrutiny might lead to discovery of constitutional violations in other arenas.

The discovery process would not, as the government claims, be onerous. The Department of Justice and individual United States Attorneys know what the policies and procedures are that guide the decisions to prosecute. They know what criteria are used to make those decisions. And they have, or could easily obtain from law enforcement, information concerning similarly situated persons who have not been arrested or presented for federal prosecution. A meaningful response from the government would permit the judicial branch to make a more reasoned decision and would not have to be duplicated with each challenge as the government appears to argue.

Assuming that the racial disparities in federal crack prosecutions are accidental outgrowths of legitimate criteria, the government might well be asked why it is so reluctant to share that criteria.

prosecutors. The same information is not available to defendants.

If, as many defendants have claimed, the disparities are due to improper selection, the government must be required to cease those practices.

This Court has stated that statistical disparities can provide "for all practical purposes" a "mathematical demonstration" of intent to discriminatorily enforce and prosecute violations. See Gomillion v. Lightfoot, 346 U.S. 339, 341 (1960). The statistics here must surely be sufficient for the preliminary step of discovery.

CONCLUSION

For the foregoing reasons, the en banc judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

January 11, 1996

Respectfully submitted,

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JAN 16 1996

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

—vs—

CHRISTOPHER LEE ARMSTRONG, *et al.*,*Respondents.*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**BRIEF OF NAACP
LEGAL DEFENSE & EDUCATIONAL FUND, INC.,
AND AMERICAN CIVIL LIBERTIES UNION AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. CONTEMPORARY EVIDENCE REVEALS THAT RACIAL BIAS CONTINUES TO INFLUENCE THE EXERCISE OF DISCRETIONARY ACTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE	4
A. Comprehensive studies initiated by state and federal courts show that racial bias continues to influence decision-making in the criminal justice system	4
1. Race continues to influence discretionary decisionmaking within the criminal justice system	5
2. Racism, both overt and unconscious, affects discretionary charging and sentencing	7
B. Eliminating racial bias, both overt and unconscious, from judicial proceedings requires that courts take specific steps to identify instances in which bias may influence decision-making and to prevent it from doing so	10
1. Despite the courts' current efforts to eradicate racial bias, overt and unconscious racism on the part of law enforcement actors persists	10
2. Adequate information must be collected, maintained and disclosed when necessary in order to determine the existence or non- occurrence of bias-influenced decisionmaking	13

3.	Based upon the availability of such reliable information, the exercise of discretion can be monitored so as to identify and eliminate discriminatory actions in the criminal justice process	14
II.	THE DISCRETIONARY DECISIONS OF FEDERAL PROSECUTORS WHETHER TO EXERT FEDERAL CRIMINAL JURISDICTION OVER NARCOTICS OFFENSES MUST BE SUBJECT TO EFFECTIVE MONITORING TO ENSURE THAT RACIAL BIAS DOES NOT INFLUENCE THEM	16
III.	THE GOVERNMENT'S VIEW THAT DISCOVERY IS NOT PERMISSIBLE UNTIL THE DEFENDANT MAKES A SUBSTANTIAL THRESHOLD SHOWING OF SELECTIVE PROSECUTION, IF ACCEPTED, WOULD IMPOSE AN UNNECESSARY AND CRIPPLING BURDEN UPON VINDICATION OF EQUAL PROTECTION CLAIMS	19
A.	The "substantial threshold" rule overprotects the government's interest in preserving broad discretionary prosecution powers.	19
B.	Such a rule is based upon a false premise: that the evidence supporting such a claim is generally and reasonably available	21
C.	The "substantial threshold" standard would impose a crippling burden of production	23

IV.	THE DISTRICT COURT'S DISCOVERY ORDER APPROPRIATELY BALANCED EACH PARTY'S LEGITIMATE INTERESTS	25
	CONCLUSION	29
	APPENDIX A	

TABLE OF AUTHORITIES

<i>Cases:</i>	<i>Pages:</i>
Alexander v. Louisiana, 405 U.S. 625 (1972)	2
Batson v. Kentucky, 476 U.S. 79 (1986)	<i>passim</i>
Carter v. Jury Commission, 396 U.S. 320 (1970)	2
Coker v. Georgia, 433 U.S. 584 (1977)	2
Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991)	12
Furman v. Georgia, 408 U.S. 238 (1972)	2
Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991)	25
Jones v. Davis, 835 F.2d 835 (11th Cir. 1988)	25
Love v. Jones, 923 F.2d 816 (11th Cir. 1991)	25
McCleskey v. Kemp, 481 U.S. 279 (1987)	2
Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995)	25
Powell v. Alabama, 287 U.S. 45 (1932)	2

Strauder v. West Virginia, 100 U.S. 303 (1880)	12
Swain v. Alabama, 380 U.S. 202 (1965)	2, 23, 24
Turner v. Fouche, 396 U.S. 346 (1970)	2
United States v. Armstrong, 48 F.3d 1508 (9th Cir. 1995)(en banc)	28
United States v. Clary, 846 F. Supp. 768 (E.D. Mo. 1994)	18
United States v. Hazel, 696 F.2d 473 (6th Cir. 1983)	22
United States v. Hoover, 727 F.2d 387 (5th Cir. 1984)	22
<i>Miscellaneous:</i>	<i>Pages:</i>
Bennett L. Gershman, Prosecutorial Misconduct (1993) ..	20, 21
California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts, 1991-1992 Public Hearings (1993)	9
D.C. Circuit Task Force on Gender, Race and Ethnic Bias, <u>Draft</u> <u>Final Report</u> , Jan. 1995	<i>passim</i>
Florida Supreme Court Racial and Ethnic Bias Study Commission, Where the Injured Fly for Justice, Dec. 11, 1990	<i>passim</i>
Florida Supreme Court Racial and Ethnic Bias Study Commission, Where the Injured Fly for Justice, Dec. 11, 1991	5, 13, 15

Georgia Supreme Court Commission on Racial and Ethnic Bias in the Court System, Let Justice Be Done: Equally, Fairly, and Impartially, Aug. 1995	5, 12, 14, 15
James Vorenberg, Decent Restraint of Prosecutorial Discretion, 94 Harv. L. Rev. 1521 (1981)	20
Massachusetts Supreme Judicial Court Commission to Study Racial and Ethnic Bias in the Courts, Final Report, Sept. 1994	<i>passim</i>
Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America, 1995	16
Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts, Final Report, Dec. 1989	<i>passim</i>
New Jersey Supreme Court Task Force on Minority Concerns, Final Report, June 1992	5, 12, 14
New York State Judicial Commission on Minorities, Executive Summary, April 1991	<i>passim</i>
Oregon Supreme Court Task Force, Report on Racial/Ethnic Issues in the Judicial System, May 1994	<i>passim</i>
Richard Berk, Preliminary Data on Race and Crack Charging Practices in Los Angeles, 6 Fed. Sentencing Rep. 36 (1993)	17
Robert Jackson, The Federal Prosecutor, 31 J.Crim.L. & Crim. 3	20
Sam Meddis, Whites, Not Blacks, At The Core of Drug Crisis, USA Today, Dec. 20, 1989	17, 18

Pages

State of Iowa Equality in the Courts Task Force,
Final Report, Feb. 1993 7, 13, 14, 15

The Washington State Minority and Justice
Commission, Racial and Ethnic Disparities in
the Prosecution of Felony Cases in King
County-Final Report, Nov. 1995 5, 7, 8

No. 95-157

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER,

v.

CHRISTOPHER LEE ARMSTRONG, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF OF NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC., AND
AMERICAN CIVIL LIBERTIES UNION AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

INTEREST OF AMICI¹

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist African Americans to secure their rights by the prosecution of lawsuits. Its purpose includes rendering legal aid without cost to African Americans suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own. For many years, its attorneys have

¹Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of the Court.

represented parties and have participated as *amicus curiae* in this Court and in the lower state and federal courts.

The Fund has a long-standing concern with the influence of racial discrimination on the criminal justice system. It has raised jury discrimination claims in appeals from criminal convictions,² pioneered in the affirmative use of civil actions to end jury discrimination,³ represented the defendant in *Swain v. Alabama*, 380 U.S. 202 (1965), and filed an *amicus* brief in *Batson v. Kentucky*, 476 U.S. 79 (1986). The Fund has also participated in a number of cases involving the influence of race upon the administration of capital punishment.⁴

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Northern California, the ACLU of Southern California, and the ACLU of San Diego and Imperial Counties, are its affiliates in the state of California where this action arose.

Since its founding in 1920, the ACLU has been particularly concerned with combatting the problems of racial discrimination in the criminal justice system. For example, the ACLU played an important role in overturning the infamous Scottsboro convictions in *Powell v. Alabama*, 287 U.S. 45 (1932). More importantly, the ACLU has been deeply involved in the effort to eliminate the discriminatory use of peremptory challenges. See e.g. *Batson v. Kentucky*, *supra*.

² E.g. *Alexander v. Louisiana*, 405 U.S. 625 (1972).

³ *Carter v. Jury Commission*, 396 U.S. 320 (1970); *Turner v. Fouche*, 396 U.S. 346 (1970).

⁴ *Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977); *McCleskey v. Kemp*, 481 U.S. 279 (1987).

This case once again brings the issue of racial discrimination in the criminal justice system to the forefront. As this Court has previously recognized, even the appearance of discrimination has a corrosive effect on public confidence in the administration of justice. The actual existence of discrimination is obviously incompatible with our most basic notions of due process and equal protection. The proper resolution of this case is, therefore, of critical importance to the Fund, and to the ACLU and its members.

SUMMARY OF ARGUMENT

The case calls upon the Court to fashion a discovery rule for selective prosecution claims.

Despite the Court's unceasing efforts to purge the administration of justice of racial discrimination, comprehensive contemporaneous studies by the state and federal courts show that racial bias continues to influence decision-making in the criminal justice process. Elimination of bias from judicial proceedings requires that courts take affirmative steps to identify instances in which bias may influence discretionary decision-making and to prevent it from doing so. Information relevant to bias and decision-making must be collected, maintained, and disclosed when necessary to determine whether a decision is bias-influenced. Today, evidence relevant to determining whether decisions of prosecutors are influenced by race is often maintained only by the prosecutor.

These studies as well as other sources show that discretionary decisions by prosecutors in drug prosecutions may sometimes be influenced by racial bias. Courts must be prepared to explore such matters thoroughly whenever a colorable basis for such a claim is presented.

The government's view that discovery is not permissible until the defendant makes a substantial threshold showing of selective prosecution ignores these realities. Such a rule overprotects the government's interest in being free of such discovery, is based upon a false view that

evidence tending to show selective prosecution is generally and reasonably available elsewhere, and would, if adopted, impose a crippling burden of production upon citizens facing criminal charges who are often indigent.

The district court utilized the correct approach in this case. Discovery of non-privileged data and charging criteria was ordered only after respondents presented credible evidence suggesting that only African Americans are prosecuted in federal court for sales of cocaine base whereas large numbers of non-blacks are prosecuted in state court where sentences are significantly lighter, and only after the district court gave careful, deliberate consideration to the government's rebuttal evidence. Such issues are best left to the district courts, and the judge in this case clearly did not abuse her discretion.

ARGUMENT

I. CONTEMPORARY EVIDENCE REVEALS THAT RACIAL BIAS CONTINUES TO INFLUENCE THE EXERCISE OF DISCRETIONARY ACTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE

A. Comprehensive studies initiated by state and federal courts show that racial bias continues to influence decision-making in the criminal justice system

During the past decade, numerous state and federal courts established task forces and charged them with appraising the treatment of racial and ethnic minorities in the courts, ascertaining public perceptions of the fairness of the judicial system, and making recommendations on reforms and identifying the response necessary to eliminate the perception and reality of race-based partiality. The unpleasant and consistent conclusion each has reached is that "inequality, disparate treatment, and injustice remain

hallmarks" of the criminal justice system.⁵ We report important findings that are relevant to the question presented.

1. Race continues to influence discretionary decisionmaking within the criminal justice system

After exhaustive research and analysis of copious data⁶, the court appointed task forces throughout the country confirmed the continued influence of racial bias at all stages of the criminal justice process. Distressingly, racial bias, both overt and unconscious, continues to cause an alarming number of law enforcement actors -- police, prosecutors, and judges -- to treat minorities differently and more harshly than similarly situated whites. Race continues to exercise influence wherever discretion is exercised, whether it be at the arrest,⁷ charging, bail,⁸ jury selection,⁹

⁵ *New York State Judicial Commission on Minorities, Executive Summary*, p. 1 (April 1991) [hereinafter "New York"].

⁶For a description of each study's methodology, see Appendix A.

⁷The Florida Supreme Court Racial and Ethnic Bias Study Commission's findings are typical. The Commission found that "An overwhelming majority of those interviewed (including, significantly, law enforcement officials) believed that minorities are treated differently from and more harshly than non-minorities at the arrest stage. [M]inority juveniles are more likely to be formally arrested than similarly situated white juveniles." Florida Supreme Court Racial and Ethnic Bias Study Commission, *Where the Injured Fly for Justice*, Dec. 11, 1990, at 62 [hereinafter *Florida I*]. The New Jersey Supreme Court Task Force on Minority Concerns concluded that there was significant evidence of discrimination by police who channel minority criminal defendants to the court system. New Jersey Supreme Court Task Force on Minority Concerns, *Final Report*, June 1992, at 132 [hereinafter *New Jersey*]; see also, e.g., The Washington State Minority and Justice Commission, *Racial and Ethnic Disparities in the Prosecution of Felony Cases in King County-Final Report*, Nov. 1995, at 52 [hereinafter *Washington*] (deputy prosecuting attorneys

or sentencing stage. One report summarized:

In short, the reality is that African-American[s] . . . are being treated differently at several stages of the . . . justice system. When the object is punishment -- detention, formal adjudication, or commitment -- minorities get more; when what is being handed out is informal processing or diversion, minorit[ies] get less. This differential treatment results, at least in part, from racial and ethnic bias on the part of enough individual police officers, . . . prosecutors, and judges to make the system operate as if it intended to discriminate against non-whites.¹⁰

report that predominantly minority areas are targeted by the police for proactive drug stings); Oregon Supreme Court Task Force, *Report on Racial/Ethnic Issues in the Judicial System*, May 1994, at 3 [hereinafter *Oregon*].

⁸See, e.g., D.C. Circuit Task Force on Gender, Race and Ethnic Bias, *Draft Final Report*, Jan. 1995, at 215 [hereinafter *D.C. Circuit*]; *New York*, at 38-40; Florida Supreme Court Racial and Ethnic Bias Study Commission, *Where the Injured Fly for Justice*, Dec. 11, 1991, at 23 [hereinafter *Florida II*] ("non-White offenders were less likely than Whites, other factors being equal, to have bail set below schedule boundaries"); *New Jersey*, at 133; Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts, *Final Report*, Dec. 1989, at 51 [hereinafter *Michigan*] ("a district judge at a judicial forum indicated that it was sometimes expedient as a matter of political reality to place a higher bond on a minority defendant"); Georgia Supreme Court Commission on Racial and Ethnic Bias in the Court System, *Let Justice Be Done: Equally, Fairly, and Impartially*, Aug. 1995, at 132-136 [hereinafter *Georgia*]; *Oregon*, at 3.

⁹See *Georgia*, at 33; *Michigan*, at 49.

¹⁰*Florida I*, at 59-60.

The cumulative effect of this differential treatment of non-whites at each level of discretionary decisionmaking has repeatedly been determined to be substantial. See e.g., *Iowa*, at 187 ("the combined effect [of racial bias] during processing in the court system is not slight"); *Florida I*, at 73; *Washington*, at 4-5.

2. Racism, both overt and unconscious, affects discretionary charging and sentencing decisions

In particular, state and federal task forces consistently identified that differences in prosecutorial charging decisions could only be accounted for by race.¹¹ For example, Michigan's task force found that racial and ethnic minorities in the Detroit metropolitan area are routinely charged with felonies for certain conduct that, when engaged in by white offenders, results in misdemeanor charges. *Michigan*, at 51. Similarly, the Massachusetts Commission reported that available data disclosed a "disturbing pattern": young black males were more likely to receive terms of incarceration than similarly situated white counterparts. Massachusetts Supreme Judicial Court Commission to Study Racial and Ethnic Bias in the Courts, *Final Report*, Sept. 1994, at 95 [hereinafter *Massachusetts*].

In New York, Blacks and Hispanics were found to be treated more harshly than whites¹², especially in majority-white counties. For example, in suburban, majority-white Westchester County, minority felony defendants with prior criminal records had a 52% chance of being incarcerated

¹¹See, e.g., State of Iowa Equality in the Courts Task Force, *Final Report*, Feb. 1993, at 174, 179-80, 187 [hereinafter *Iowa*]. *Florida I*, 66-67; *Washington*, at 5, 51.

¹²For example, in misdemeanor cases, whites were assessed fines while Blacks and Hispanics with similar backgrounds were sentenced to jail for similar misdemeanors. *New York*, at 41.

while similarly situated white felony defendants had only a 39% chance of being incarcerated. *New York*, at 41, citing New York State Division of Criminal Justice Services study. See also *Washington*, at 54 ("Longer periods of confinement were recommended for Black offenders than for White offenders, even after we took into account legally relevant factors").

This disparate treatment has been acknowledged by prosecutors and judges as well. For example, a federal judge testified to the influence of unconscious racism on discretionary charging and sentencing decisions in the following terms:

I'm not suggesting deliberate discrimination by the U.S. Attorney, but I have seen throughout my years as a judge a different view brought to cases where a prosecutor may feel there is not something worth saving I think there is perhaps a natural tendency to think with the white male, "Here's a young person with no prior problems with the law. We don't want to destroy his future." There may not be the same feeling for the black male, just a sense that he is not going to go far anyway. I don't think this is deliberate discrimination, but it results in more of a tendency to find a way out for the white male than the black male.¹³

To similar effect were the observations of a state judge:

[A]gain, it's this institutional-it's the subtle, it's the unconscious kind of racism. There was an incident that happened in Palm Springs following a sentencing seminar sponsored [by] either CJA or CJER. And judges were in the pool relaxing afterwards, and there was a conversation going on about sentencing and talking about what we had discussed earlier. And among two of the judges, they said, well, they

¹³ *D.C. Circuit*, at 165.

had decided that for Blacks, the sentencing option of jail and longer jail sentences was the more appropriate sentence than for Whites or for Asians, because everybody knew there wasn't any social stigma attached to Blacks going to jail, because, first of all, they live in communities where everybody was Black, and so they didn't have any reason to be embarrassed, so if you just gave a little jail time, it would be all right.¹⁴

Moreover, a District of Columbia federal prosecutor opined that disparate treatment occurred less innocently:

I think the judges are less harsh with a white defendant as opposed to a black defendant. A judge will be lenient to a white defendant and when a black man commits the same offense, they will send him away. It is appalling. They may see a white defendant and they connect.¹⁵

That such bias stems from a government actor's unstated and inarticulate intuition that a defendant deserves different treatment because of his race hardly makes it less of an offense to bedrock equal protection principles.

The task forces' sincere efforts at self-scrutiny have consistently yielded this alarming conclusion: that racial bias in the administration of justice is pervasive and persistent and threatens both the appearance and reality of evenhanded justice.

¹⁴ California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts, *1991-1992 Public Hearings*, at 87 (1993).

¹⁵ *D.C. Circuit*, at 162. Another prosecutor told the D.C. Circuit task force, "The judges are predominately a white bunch and they tune into factors that are familiar to them personally." *D.C. Circuit*, at 214.

B. Eliminating racial bias, both overt and unconscious, from judicial proceedings requires that courts take specific steps to identify instances in which bias may influence decision-making and to prevent it from doing so

A second consistent theme of these judicially endorsed reports is also clear: unless courts act more vigilantly, racial bias will never be eradicated from the administration of justice and public confidence will wane further. One task force stated, "[P]ublic confidence in our system of justice must become and remain a priority for each member of that system." *Michigan*, at 23. See also *Massachusetts*, at 4.

Only by acknowledging that bias persists and by taking the necessary steps to deal with it will courts dispel the notion held by some members of the public that the courts are tolerant of race discrimination. Undertaking this challenge is essential because:

Like any relationship, the relationship between the courts and the communities around them needs attention and care to ensure that each party understands and trusts the other. By giving more attention to these relationships, the courts would not only better serve the community, they would also make their own jobs easier by enhancing the community's confidence in the administration of justice.¹⁶

1. Despite the courts' current efforts to eradicate racial bias, overt and unconscious racism on the part of law enforcement actors persists

The task forces found that for minorities, overt racism on the part of law enforcement actors is a fact of life.

¹⁶ *D.C. Circuit*, at 5-6.

An instance of such bias helped to bring about the creation of the Massachusetts Commission: In August 1988, during a criminal session of the Suffolk Superior Court, Assistant Attorney General Thomas H. Brewer, an African American, attempted to gain access to a part of the courtroom that he was entitled to enter. However, because of his race, two court officers mistook the Assistant Attorney General for a defendant and physically attempted to bar him from the courtroom.¹⁷

Such incidents by law enforcement actors sadly are not uncommon and were reported to other commissions.¹⁸ Additionally, judges continue to exhibit overt racism in the courtroom. The Oregon task force was disturbed by an incident in which a Mexican-American defendant appeared before a judge on the issue of whether the defendant's diversion program should be revoked for nonpayment of diversion fees. In open court, the judge admonished the defendant as follows:

I'm not going to let him just hold out money. And I know just darn good and well where that money from [his job] went. I'll bet a good part of it went down South, and that's his business, except that he's got this obligation here.

¹⁷ Doris Wong, *Shannon Office to Probe Alleged Court Assault*, *The Boston Globe*, Dec. 13, 1988, at 29.

¹⁸ For example, an African-American attorney related his experience to the New York task force:

In criminal court in New York County I was grabbed from behind in a chokehold around the throat by a court officer who assumed that I was a defendant approaching too close to [a judge] who had motioned me to approach the bench.

New York, at 88.

Oregon, at 1.

That such brazen, on the record comments are exceptional, however, should not blind courts to the extent that unconscious racism based upon racial stereotypes and cultural misunderstandings also permeates the administration of justice. The Georgia task force noted that "there are incidences of bias which appear to result from unintentional conduct or conduct resulting from a lack of awareness." *Georgia*, at 9. See also, *Oregon*, at 2.

Indeed, the elusiveness of this subtle or even unconscious racism makes it in one respect more problematic than overt racism: without heightened attentiveness, it is likely to go detected in any individual case. As one report put it, "Like the presence of poison in food or certain pollutants in the air, bias in decision-making may not always be readily detectible by the unwary." *Florida I*, at 5.

Ongoing, unchecked racial bias mocks the idea that justice is dispensed equally to all under the law. Not surprisingly, incidents recounted in the reports explain why too many Americans distrust the fairness of our courts. As this Court has repeatedly acknowledged, racial bias fundamentally undermines the integrity of the criminal justice system in violation of the bedrock guarantee of equal treatment embodied in the Fifth and Fourteenth Amendments. See e.g. *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

While existing mechanisms may be relied upon in cases where race discrimination is overt, the compelling evidence cited above require courts to develop appropriate solutions to reach those circumstances in which racism takes more subtle form. The resolution of such problems "will require an extraordinary intellect, unswerving compassion and most importantly, a level of candor that will engender respect for any decision the Court might reach." *New Jersey*, at ii.

The task forces identified tools to deal with the more subtle bias that has been found to infect discretionary decisionmaking: adoption of systems for collection of relevant data necessary for monitoring discretionary decisions, the promulgation of guidelines to channel the exercise of discretion to avoid bias, and development of new remedies for addressing bias. As the Florida commission found, there is a "need for fundamental reforms to eradicate the stain of racism from the garments of justice." *Florida II*, at viii.

2. Adequate information must be collected, maintained and disclosed when necessary in order to determine the existence or non-occurrence of bias-influenced decisionmaking

During the course of their investigations, the task forces discovered that a major roadblock to determining whether bias existed in the criminal justice system was the difficulty of gathering the necessary data. They were hampered by the lack of systematic institutional mechanisms for compiling bias data and were often forced to conduct their own studies, which usually required considerable financial resources. See, e.g., *Iowa*, at 188; *Florida II*, at 60. Much of the information analyzed by the court task forces came from District Attorneys' Offices.¹⁹

Since prosecutors' offices already possess access to the information needed to make a comprehensive study of bias, the task forces concluded that these offices should assume the responsibility for gathering much of the

¹⁹Law enforcement officers consulted cooperatively with the task forces in a variety of ways, including releasing an array of information about their internal practices. See *Florida II*, at 46; *Massachusetts*, at 93-4 (District Attorneys' offices provided the most useful data on sentencing disparities because their files were the most complete). The cooperation of the prosecutors' offices was essential because relevant information was not always available to the public. See *D.C. Circuit*, at 200.

information crucial to monitoring bias. Data regarding exercise of prosecutorial discretion would then be readily available.²⁰

The task forces also recommended that bias data be made routinely available to all concerned, including the public, *see Iowa*, at 190 (any patterns of racially associated disparities should be publicly disseminated, and specifically brought to the attention of the Districts where the disparities occurred); *New York*, at 43 (sentencing statistics concerning the race of the victim, defendant and complainant along with case outcome should be maintained and published by the Unified Court System in cooperation with the New York State Department of Criminal Justice Services), and that periodic studies to determine the existence or influence of racial bias be undertaken. *See Massachusetts*, at 24; *Georgia*, at 165; *New Jersey*, at 133.

3. Based upon the availability of such reliable information, the exercise of discretion can be monitored so as to identify and eliminate discriminatory actions in the criminal justice process

Reliable data must be disclosed when necessary to avoid the influence of bias because "[t]he need for discretion, while compelling, must be balanced against the potential for abuse. The need to ensure that the charging decision is free from racial and ethnic bias must be taken into account." *Oregon*, at 35. *See also Florida I*, at 77. Only

²⁰*See, e.g., Iowa*, at 190 (county attorney offices should keep records of the charges on initial arrest, the charges ultimately filed, the arrests they chose not to prosecute, the reasons they chose not to prosecute, and the race and gender of the alleged perpetrators); *Massachusetts*, at 24, 95 (District Attorney's office should be responsible for collecting data on case processing between the police, the department of probation, and other law enforcement agencies); *Oregon*, at 35 ("District attorneys should be required to collect and report to the Criminal Justice Council data on the variable of race in all charging decisions").

by having data available will it be possible to monitor effectively the influence of bias in the discharge of the official responsibilities of the police, the prosecution and the judiciary. *See Massachusetts*, at 24.

Traditionally, prosecutorial discretion has been regarded not only as broad but as virtually immune from external scrutiny based upon the assumption that adequate internal mechanisms are in place to deal with overt discrimination. Time and again, the task forces concluded that the traditional approach, leaving the exercise of discretion to internal monitoring only, was inadequate to prevent subtle forms of discrimination.

The task forces concluded that new monitoring mechanisms are sorely needed,²¹ and that the monitoring of discretionary decisionmaking encourages awareness of racial bias, thereby helping to eradicate it.²²

The task forces also concluded that traditional remedies for race discrimination are often ineffective. For example, many concluded that trial courts too often fail to police the discriminatory exercise of peremptory challenges by prosecutors. Thus, one task force recommends allowing appellate courts to review *Batson* issues *de novo*. *Georgia*, at 33. Similarly, the Michigan task force expressed alarm after it was unable to find even one reported Michigan decision in which a *Batson* claim was found meritorious. *Michigan*,

²¹These include promulgating regulations to channel discretion, conditioning funding to prosecutor's offices on the requirement that their offices eliminate the discriminatory effects of their decisions, requiring the submission of reports detailing discretionary practices for review, and creating a state-wide database which includes information about sentencing and charging decisions for outside monitoring. *See Oregon*, at 35, 44; *Georgia*, at 31; *Florida I*, at 66-67, 76; *Florida II*, at 44; *Massachusetts*, at 97; *New York*, at 43; *Iowa*, at 188; *Michigan*, at 55.

²²*See Florida II*, at 43-44; *Georgia*, at 166-67.

at 49. Thus, it recommended that trial judges be encouraged to implement the *Batson* standard on their own initiative in any jury selection process in which peremptory challenges appear to be racially motivated. *Id.* See also *New York*, at 59 ("Judges should exercise heightened scrutiny to ensure that peremptory challenges are not used improperly").

II. THE DISCRETIONARY DECISIONS OF FEDERAL PROSECUTORS WHETHER TO EXERT FEDERAL CRIMINAL JURISDICTION OVER NARCOTICS OFFENSES MUST BE SUBJECT TO EFFECTIVE MONITORING TO ENSURE THAT RACIAL BIAS DOES NOT INFLUENCE THEM

Prosecutorial discretion contributes to the widening gulf between juvenile and adult African-Americans' and other offenders' incarceration rates. While "the total number of white juveniles brought to court on drug charges in 1990 exceeded the total number of blacks by 6,300 . . . , a far greater number of white youths were sent home without being tried, were released to drug counseling programs, or were placed on probation. Consequently, 2,200 more blacks than whites ended up on correctional facilities."²³ Figures for adult crack and cocaine

²³Ron Harris, *Hand of Punishment Falls Heavily on Black Youth*, L.A. Times, August 24, 1993 at 7 [hereinafter *Punishment*]. Other data shows that drug abuse is centered largely in the white community. African-Americans make up 12% of the U.S. population, 13% of all monthly drug users, but represent 35% of those arrested for drug possession, 55% of those convicted of drug possession, and 74% of those sentenced to prison for drug possession. The Sentencing Project, *Young Black Americans and the Criminal Justice System: Five Years Later*, Oct. 1995. See also Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America*, 1995, at 49. ("Blacks are arrested and confined in numbers grossly out of line with their use or sale of drugs").

prosecutions are similar.²⁴

A recent survey of prosecutions for crack cocaine offenses conducted by the Los Angeles Times revealed that not a single white offender had been convicted of a crack cocaine offense in the federal courts serving the Los Angeles metropolitan area since 1986, despite the fact that whites comprise a majority of crack users. Dan Weikel, *War on Crack Targets Minorities Over Whites*, L.A. Times, May 21, 1995, quoted in The Sentencing Project, at 10 (1995). Moreover, according to a study by Richard Berk, between 1990 and 1992, over 200 white crack dealers were prosecuted by the state authorities in Los Angeles, a period during which the U.S. Attorney's office prosecuted not one white defendant for crack. Richard Berk, *Preliminary Data on Race and Crack Charging Practices in Los Angeles*, 6 Fed. Sentencing Rep. 36 (1993).

Just as the existence of a pattern of employing peremptory challenges with the result of removing Black or other minority jurors from panels suggests the possibility that this aspect of prosecutorial discretion may be influenced by racial bias, and requires the carefully delineated judicial remedy created by this Court in *Batson*, so too do the data summarized above support -- indeed compel -- the conclusion that a similar judicial remedy must be available to preserve the integrity of the federal criminal justice system. Unless the potential for discriminatory decision-making is addressed, public support for and confidence in federal criminal procedures will be eroded by the suspicion

²⁴In 1989, former Drug Czar William Bennett described the typical cocaine user as a "white, male, high school graduate, employed full time and living in a small metropolitan area or suburb." Sam Meddis, *Whites, Not Blacks, At The Core of Drug Crisis*, USA Today, Dec. 20, 1989, at 11A. The Justice Department offered the following profile of crack users in the United States during 1991: 49.9% of crack users are White, 35.9% are Black, and 14.2% are Hispanic. U.S. Department of Justice, Bureau of Justice Statistics, *Drugs, Crime, and the Justice System*, Dec. 1992, at 28.

that drug laws generally, and the "cocaine base" laws specifically, are being administered in a racially discriminatory manner. That is surely the view of a growing number of law enforcement officials²⁵ and judges²⁶ who have been on the front lines throughout the "War on Drugs."

²⁵ Former Atlanta Police Chief Eldrin Bell remarked recently:

I wonder if because it is blacks . . . who are going to jail in massive numbers, whether we . . . care as much? If we started to put white America in jail at the same rate that we're putting black America in jail, I wonder whether our collective feelings would be the same, or would we be putting pressure on the president and our elected officials not to lock up America, but to save America?

Nkechi Taifa, *Laying Down the Law, Race by Race*, Legal Times, Oct. 10, 1994, at S36.

Steven Madison, an Assistant U.S. Attorney in Los Angeles, admits that minorities are targeted in crack cocaine arrests and prosecutions. He stated that while crack is sold and used in middle and upper class communities, law enforcement focuses on crack cocaine dealers in minority neighborhoods because, as a result of limited resources, "we went where the brush fires were." Sam Meddis, *supra* n.24, at 11A.

²⁶ A federal judge remarked recently:

As sad as it may sound, and as much as the Court feels discomfort in pointing it out, if young white males were being incarcerated at the same rate as young black males, the statute would have been amended long ago.

United States v. Clary, 846 F. Supp. 768, 792 (E.D. Mo. 1994).

III. THE GOVERNMENT'S VIEW THAT DISCOVERY IS NOT PERMISSIBLE UNTIL THE DEFENDANT MAKES A SUBSTANTIAL THRESHOLD SHOWING OF SELECTIVE PROSECUTION, IF ACCEPTED, WOULD IMPOSE AN UNNECESSARY AND CRIPPLING BURDEN UPON VINDICATION OF EQUAL PROTECTION CLAIMS

Despite the swirling controversy surrounding federal drug prosecutions as well as the contemporary evidence that racial bias continues to influence charging decisions yet is difficult to ferret out, the government seeks a rule which, if adopted, would render it immune from any discovery in nearly all selective prosecution cases, regardless of their merit. The Court should reject this approach because it is based upon a false premise that overprotects the prosecution function and would impose an unrealistic and crippling burden of production upon defendants.

A. The "substantial threshold" rule overprotects the government's interest in preserving broad discretionary prosecution powers.

The government asks the Court to hold that "judicial inquiry into a prosecutor's reasons for bringing a prosecution should not even begin unless there is a substantial and concrete basis for suspecting unconstitutional conduct." U.S. Brief at 19. Two justifications are advanced in support: "[b]y requiring a significant threshold showing, courts may avoid unwarranted and highly intrusive inquiries into a prosecutor's judgment . . . [as well as] prevent the needless diversion of government and judicial resources from the adjudication of the criminal case to the disposition of the selective prosecution motion." *Id.* at 20. Neither justifies such a demanding standard.

To acknowledge that the prosecutor enjoys spacious discretion in deciding whom to prosecute is also to recognize that such power "is the power to control and destroy

people's lives."²⁷ Justice Jackson observed that this broad power of choice held within it the power to abuse "some group of unpopular persons"²⁸ Thus, it is the very breadth of such power that creates the potential for unequal treatment.

The risk of unequal treatment created by standardless discretion is troubling not only as a threat to due process but also in its own right as well. Giving prosecutors the power to invoke or deny punishment at their discretion raises the prospect that society's most fundamental sanctions will be imposed arbitrarily and capriciously and that the least favored members of the community -- racial and ethnic minorities, social outcasts, the poor -- will be treated most harshly.²⁹

Prosecutors are clothed with such broad powers for a noble purpose -- to enable them to seek the "equitable objective of individualized justice" within a system of limited resources.³⁰ But any time the defendant's race enters the calculus, this high purpose is defeated, and the justification for deferential judicial oversight vanishes.

When a citizen makes a colorable showing that race likely influenced the prosecutor's decision to file the pending charge, and claims that she needs access to government files to generate additional proof of invidious discrimination, the Court should require nothing more. Once an honest

²⁷ Bennett L. Gershman, *Prosecutorial Misconduct*, at 4-7 (1993)[hereinafter Gershman].

²⁸ Robert Jackson, *The Federal Prosecutor*, 31 J.Crim.L. & Crim. 3, 5 (1940).

²⁹ James Vorenberg, *Decent Restraint of Prosecutorial Discretion*, 94 Harv. L. Rev. 1521, 1555 (1981)[hereinafter Vorenberg].

³⁰ Gershman, at 4-6.

question is raised about the very legitimacy of the proceeding, it is in the government's interest as much as the defendant's to have the issue resolved conclusively by a neutral magistrate based upon *all* relevant information. Requiring the defendant to show more serves no purpose other than to suggest that only citizens who are particularly nimble at detecting bias enjoy a meaningful opportunity to be heard.

B. Such a rule is based upon a false premise: that the evidence supporting such a claim is generally and reasonably available

Even though "the fate of those accused of crime is determined by prosecutors . . . out of public view -- in the hallways of the courthouse, in the prosecutors' offices, or on the telephone,"³¹ the government argues that the evidence necessary to demonstrate selective prosecution is generally available from sources other than the government's files. U.S. Br. at 26-27. Thus, it is suggested, the defense is not unfairly burdened by a substantial threshold rule.

This has surely not been our experience, nor that of other respected students of the issue. Former federal prosecutor Gershman has written that "proving improper motivation . . . is extremely difficult, and tends to explain the infrequency with which" selective prosecution claims are advanced.³² He believes that discovery should follow once "a colorable entitlement or plausible justification" is demonstrated.³³ Former Department of Justice Official Vorenberg agrees:

. . . the problems involved in proving that a prosecutor had an impermissible motive or personal

³¹ Vorenberg, at 1522.

³² Gershman, at 4-8.

³³ *Id.* at 4-26.4.

animus are enormous. Rarely will a prosecutor explicitly signal improper motives. Unless he does, the defendant must try to draw a clear inference of discrimination by comparing his case with those of persons who were not charged,³⁴

The cases upon which the government relies prove only that in certain unusual circumstances, the defendant may have the ability to present considerable evidence of similarly situated persons who were not prosecuted, as well as some evidence of illicit motive. They hardly make the case for a hard and fast heightened showing in every case. For example, in *United States v. Hoover*, 727 F.2d 387 (5th Cir. 1984), Hoover was one of three of nearly 300 air traffic controllers criminally prosecuted after going out on strike. He was able to show the pool of similarly situated persons easily because they all belonged to the same union and he was their leader. Similarly, in *United States v. Hazel*, 696 F.2d 473 (6th Cir. 1983), the defendant was able to show other similarly situated persons who were not prosecuted because they were members of a tax revolt group to which he belonged.

More often, however, and as in this case, citizens claiming selective prosecution have no special or ready access to the identity of similarly situated persons whom prosecuting authorities chose not to prosecute for similar offenses. And where the basis of the motion is racial discrimination, it is extremely rare for public court files to contain information on the defendant's race. As the task forces found, generation of a data base with the identity of such persons that includes their race and ethnic identity is an enormously time-consuming and expensive proposition when undertaken without the cooperation of the prosecuting attorneys' office. Thus, there is little substance to the

³⁴ Vorenberg, at 1542.

government's assurance that a heightened burden would not foreclose the assertions of such claims.³⁵

C. The "substantial threshold" standard would impose a crippling burden of production

Indeed, the government's argument bears an uncomfortable resemblance to the supporting pillars of the now discredited rule of *Swain v. Alabama*, 380 U.S. 202 (1965): The government insists that prosecutors are presumed to act in good faith and thus should not be subject even to judicial inquiry into illicit motive in the absence of concrete evidence showing otherwise.³⁶ Just as unfettered exercise of the peremptory challenge was good for the cause of justice because it gave the government and defense appropriately broad leeway to remove biased jurors who might escape for-cause removal, the government claims similarly broad prosecutorial discretion best assures that limited resources will be used in the most appropriate cases.³⁷ Courts are ill-equipped, in any event, the argument continues, to review such decisions, and requiring a prosecutor to explain why she is prosecuting a particular case, like having her explain why a peremptory strike was used to eliminate a particular juror, will bring about delay

³⁵ In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States advanced a similar argument in support of retention of the rule of *Swain v. Alabama*. See *Batson v. Kentucky*, No. 84-6263, Brief of United States As Amicus Curiae Supporting Affirmance at 26-27 ("We also find unpersuasive the argument that *Swain* makes it unduly difficult to demonstrate impermissible use of peremptory challenges even when such abusive practices are actually going on. . . . Moreover, public defender's offices and defense counsel's organizations are well situated to collect the requisite statistics.") As it did in *Batson*, the Court should reject such assurances as unrealistic.

³⁶ *Swain*, at 222; U.S. Br. at 16, 19.

³⁷ *Swain*, at 221; U.S. Br. at 17.

and deflect limited resources from the prosecution of law breakers.³⁸

If the Court accepts the government's position, and predicates access to even non-privileged information on defendants' making a robust showing, defendants will be denied meaningful judicial determination of their Equal Protection claims unless they can first pull together a credible composite of selective enforcement from other sources, a task that in many cases will require painstaking review of hundreds of court files, consultation with scores of other attorneys, and pursuing other sources sufficient to generate a body of similarly situated persons not prosecuted.

Such a burden significantly exceeds that which the Court determined, in *Batson v. Kentucky*, 476 U.S. 79, 92 n.17 (1986), to be crippling. Justice Powell described such a burden through examples from lower court cases:

The lower courts have noted the practical difficulties of proving that the State systematically has exercised peremptory challenges to exclude blacks from the jury on account of race. As the Court of Appeals for the Fifth Circuit observed, the defendant would have to investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges. [citation omitted] The court believed this burden to be "most difficult" to meet. In jurisdictions where court records do not reflect the jurors' race and where voir dire proceedings are not transcribed, the burden would be insurmountable. [citation omitted]

We now know that the *Swain* rule was able to shelter for years the intentional discriminatory conduct of certain

³⁸ *Swain*, at 221-22; U.S. Br. at 17.

prosecutors.³⁹ Adoption of a similar standard here would surely generate similar sorry results.

IV. THE DISTRICT COURT'S DISCOVERY ORDER APPROPRIATELY BALANCED EACH PARTY'S LEGITIMATE INTERESTS

The district court ordered discovery in this case only after deliberate and thorough consideration both of the respondent's showing that a significant statistical disparity existed in the race of defendants prosecuted in federal court for crack distribution violations and of the government's explanations for that disparity.

With their motion for discovery, respondents introduced evidence showing a pattern of prosecutions which suggested that race was a significant charging factor. Respondents demonstrated that all 24 crack cocaine cases prosecuted by the government and closed by the Federal Public Defender's Office in 1991 involved black defendants.

At the hearing on the discovery motion, the district judge expressed concern that the "government hasn't offered any explanation at all as to why . . . persons . . . being brought . . . to Federal court for these drug offenses . . . all . . . are black."⁴⁰ The judge offered the government an

³⁹ See e.g., *Jones v. Davis*, 835 F.2d 835 (11th Cir. 1988)(blacks systematically excluded from petit jury service in Mobile County, Alabama over significant period of time by state peremptory strikes); *Love v. Jones*, 923 F.2d 816 (11th Cir. 1991)(blacks systematically excluded from petit jury service in Madison County, Alabama via state peremptory challenges); *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991)(blacks systematically excluded from petit jury service in 8 Georgia counties from 1974-81 via peremptory challenge); *Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995)(blacks systematically excluded from two Arkansas county petit juries from 1970-75 by state's use of peremptory strikes).

⁴⁰Hearing of Sept. 8, 1992, at 8.

opportunity to provide an explanation. However, at the hearing, the assistant United States Attorney was unable to offer any explanation for the disparity, stating, "I can't explain why the public defender's office has only encountered black defendants [in] crack cocaine cases--I would have no explanation for that."⁴¹

In the face of the government's complete inability to explain the statistical disparity, the district judge ordered limited discovery, explaining that "what the Court wants to know is whether or not there is any criteria in deciding which of these cases will be filed in state court versus Federal court and if so, what is that criteria."⁴²

To determine the appropriate scope of the discovery order, the Court took into account the government's assertion that one criteria it used for deciding whether to file in federal rather than state court was the existence of a joint federal/state investigation. Government counsel explained that a joint federal/state investigation is initiated when there is use of a firearm in connection with a narcotics trafficking violation.⁴³ In response to this explanation, the judge directed discovery of four specific non-privileged items: a list of all cases from 1989-1992 in which the government charged both cocaine base offenses and firearms offenses, the race of defendants in each of these cases, whether each case was investigated by federal, state or joint law enforcement authorities, and an explanation of the criteria used by the United States in deciding whether to bring cocaine base cases in federal court.

In its motion for reconsideration of the discovery order, the government offered some of its criteria for prosecuting cases in federal as opposed to state court. As

⁴¹*Id.* at 9.

⁴²*Id.* 26-27

⁴³*Id.* at 20-21.

part of its explanation, the government submitted the declaration of the Chief of the Criminal Complaints Section of the U.S. Attorney's Office which stated that the decision to bring the instant case in federal court was made because the case met the general criteria the government applies to all crack cases. However, the purported general criteria simply described several aspects of the instant case. Counsel for the government later suggested that the official general criteria applied to all crack cases were in fact the same as the criteria present in the instant case.⁴⁴

In response to the government's explanation, respondents argued that a number of the defendants did not satisfy the suggested criteria.⁴⁵ Moreover, respondents introduced evidence demonstrating that white crack cocaine dealers exist and are prosecuted in state court only.⁴⁶

After carefully weighing all the evidence, the district judge found the explanations offered by the government

⁴⁴Government's Motion for Reconsideration, at 24-25; Hearing of Dec. 4, 1992, at 6-8.

⁴⁵Hearing of Dec. 4 1992, at 26

⁴⁶First, the respondents introduced an affidavit of defense attorney Reed, Director of the Criminal Courts Bar Association Indigent Defense Panel. The Indigent Defense Panel handles more state court criminal cases than any other association within Los Angeles County and is composed of over two hundred defense lawyers. Reed attested that as Director of the Indigent Defense Panel, he speaks to many state court judges, prosecutors, and defense attorneys who state that there are many crack cocaine sale cases prosecuted in state court that involve racial groups other than blacks. Hearing of Dec. 4, 1992, at 28-29. Second, defense counsel O'Connor submitted an affidavit stating that she had spoken to Chris Fernandez, the intake coordinator at Impact House in Pasadena, California, who stated that in his experience dealing with the treatment of cocaine base addiction, there are equal numbers of minority and caucasian users and dealers of crack.

inadequate, concluding that the government had failed to make clear the criteria, "if there is any criteria, for bringing this case and others like it in Federal court."⁴⁷ Thus, the court affirmed her discovery order.

The district judge's approach to ordering the limited discovery in this case was cautious, careful and reasonable. First, the judge, confronted with un rebutted evidence of a pattern of racial prosecutions, gave the government a full and fair opportunity to offer an explanation. Only after the government was unable to offer a single explanation for the racial disparity did the judge order limited discovery of nonprivileged relevant information. This order is structured in a way that limits its reach to evidence directly relevant to issues that the government articulated were its criteria for bringing crack cocaine cases in federal as opposed to state court.

The Court should view this order as a sound resolution of this fact-intensive dispute. Because respondents have set forth a colorable showing, and "without discovery, the contention that 'other similarly situated' have not been prosecuted . . . may be impossible to show,"⁴⁸ the lower court judgment should be affirmed.

⁴⁷Hearing of Jan. 5, 1993, at 3.

⁴⁸*United States v. Armstrong*, 48 F.3d 1508, 1521 (9th Cir. 1995)(*en banc*)(Wallace, C.J., concurring).

CONCLUSION

Amici curiae respectfully request that the Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

The state and federal court task forces were charged with determining whether racial and ethnic bias still affects the administration of justice. It is impossible to capture the thoroughness of the research conducted by each task force and the breadth of their findings and recommendations. However, to lend some context in which to understand the task force reports, below is a brief description of the methodology employed by each state and federal court task force on race and ethnic bias in the courts and excerpts from each study's findings and recommendations. In addition, where the information was available, a brief history of the task force's creation is included.

COMMITTEE ON RACE AND ETHNICITY TO THE D.C. CIRCUIT TASK FORCE ON GENDER, RACE AND ETHNIC BIAS, DRAFT FINAL REPORT, JAN. 1995

The Task Force was created in 1990 by the D.C. Circuit Judicial Council. The Task Force was created because, while efforts to explore race and ethnicity were underway at the state and local levels, there was growing recognition that these issues merited attention within the federal judicial system as well.

The Task Force interviewed judges on the Circuit to obtain their experiences and observations relating to gender, race, and ethnicity. It interviewed 80% of the trial judges, and 3 appellate judges of the Circuit. Judicial interviews were both anonymous and voluntary. Two appellate judges submitted written comments. The task force also conducted focus groups with practicing attorneys, community representatives, and courthouse personnel.

RECOMMENDATIONS

The Federal Judicial Center, or another appropriate body, should study the results of litigation (such as employment

discrimination cases) that involve issues of race, ethnicity, or gender and that affect a significant number of racial and ethnic minorities, through research controlling for the gender, race or ethnicity of the parties and attorneys in such cases.

FLORIDA SUPREME COURT RACIAL AND ETHNIC BIAS STUDY COMMISSION, WHERE THE INJURED FLY FOR JUSTICE: REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA, DEC. 11, 1990

The Commission was created on December 11, 1989 by the Chief Justice. It was charged with assessing whether race affected the dispensation of justice and with developing longterm strategies to eradicate any vestiges of discrimination.

The Commission developed the findings and recommendations contained in its report after analyzing information from several different sources. First, the Commission held public hearings in every region of the state. Second, the Commission retained leading researchers from Florida's universities and nationally recognized experts to conduct studies and to assist it in formulating the findings and recommendations contained in the report.

FINDINGS:

Extensive evidence suggests that minorities are too often subjected to the threat of abuse and brutality by law enforcement organizations. Survey responses suggest that African-Americans and Hispanic individuals are stopped and detained more frequently than a non-minority would be under similar circumstances and are treated with less respect and more unnecessary force than are their white counterparts.

Minority juveniles are being treated more harshly than non-minority juveniles at almost all stages of the juvenile justice system, including: arrest; referral for formal processing; transfer to the adult criminal justice system; secure detention prior to adjudication; and commitment to traditional state-run facilities.

Opportunities for informal processing and diversion are not equally accessible to minority juveniles. The deeper the penetration of the juvenile justice system towards "deep-end" commitment, the greater the overrepresentation of minority juveniles.

The differential treatment of minority juveniles results, at least in part, from racial and ethnic bias on the part of enough individual police officers, intake workers, prosecutors, and judges, to make the system operate as if it intended to discriminate against minorities. It results as well from bias in institutional policies, structures, and practices.

RECOMMENDATIONS:

Police practices, including field adjustments, relating to law enforcement interaction with juveniles should be recorded for supervisory review and monitoring to determine whether and how race or ethnicity has entered into arrest and disposition decisions by Florida's law enforcement personnel.

The State should mandate the establishment of procedures, in each of the agencies comprising the juvenile justice system, to encourage and provide means for reporting, investigating, and responding to professionals whose decisions appear to have been influenced by racial or ethnic bias.

FLORIDA SUPREME COURT RACIAL AND ETHNIC BIAS STUDY COMMISSION, WHERE THE INJURED FLY FOR JUSTICE: REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA, DEC. 11, 1991

The Legislature, through the joint efforts of the criminal justice and corrections committees of the House and Senate,...should immediately undertake a review of those cases prosecuted under both mandatory minimum statutes and the "habitual offender" statute to determine the effect of race or ethnicity in their selection, processing, or ultimate disposition. To the extent that improper considerations are playing a role, the Legislature should repeal these statutes altogether.

The Florida Legislature should require, as a condition of funding, that each State Attorney: a) promulgate effective criteria which ensure the fair and equal exposure of individuals to processing under mandatory minimum statutes; and b) annually submit a report to the legislative appropriations committees detailing the racial/ethnic composition of all individuals prosecuted under these statutes. To the extent that such reports reveal racial/ethnic disparities in the population of individuals who are prosecuted under these statutes, the Legislature should require a detailed justification for the impact of prosecutorial decision-making in this area.

GEORGIA SUPREME COURT COMMISSION ON RACIAL AND ETHNIC BIAS IN THE COURT SYSTEM, LET JUSTICE BE DONE: EQUALLY, FAIRLY, AND IMPARTIALLY, AUG. 1995

The Commission was created by the Georgia Supreme Court on February 1, 1993. The Commission held six public hearings throughout the state. In addition, the Commission conducted an attitude survey in order to assess

the perceptions of judges, clerks and attorneys practicing in Georgia courts. All judges of the superior, state, juvenile, and probate courts, chief magistrates, and clerks of the superior court were sent surveys in the Fall of 1994. Fifty to sixty percent of each group returned completed questionnaires. The attorney attitude survey was sent to a sample of 2,000 attorneys. Thirty-one percent of the attorneys surveyed responded.

RECOMMENDATIONS

Each circuit should be directed to develop and implement (pending the approval of the Supreme Court) a formal pre-trial release policy, specifying factors used in determining eligibility for bail.

The State has the ability to undertake additional objective testing of the perception of bias in mandatory sentencing. First, a complete and thorough study of the application of [the mandatory sentencing statute] should be conducted, breaking down data for each circuit. In order to achieve this, information of the criminal record of the defendant, the type of representation (private, public defender, or appointed indigent defense), the type of disposition (plea or trial), and the quantity of drugs should be developed, obtained and incorporated into the relevant databases.

The Implementation Committee with the assistance of such agencies as the Georgia Statistical Analysis Bureau (under the auspices of the Criminal Justice Coordinating Council) and the Prosecuting Attorneys' Council, should see that these studies are conducted. Periodic analyses and assessments of other mandatory sentences should be conducted so as to detect potential racial disparity. If such studies do indicate racial bias in the court system, the Implementation Committee should pursue steps to rectify any problems.

[T]he Prosecuting Attorney's Council [should] develop explicit, race-neutral guidelines for use in [mandatory minimum] cases by district attorneys to safeguard against bias.

The Commission feels that the legislature and the courts should consider four alternative recommendations as possible means of addressing this issue [of peremptory challenges]:

Peremptory strikes could be eliminated in civil and criminal cases.

De novo appellate review of trial court decisions on *Batson* motions could be provided.

Trial judges could conduct voir dire using questions submitted in advance in writing by counsel.

Trial judges could be encouraged to sustain *Batson's* objections when the questioned strike was made for frivolous, "hunch-type" reasons unrelated to the case at bar.

STATE OF IOWA EQUALITY IN THE COURTS TASK FORCE, FINAL REPORT, FEB. 1993

The Supreme Court of Iowa established the Equality in the Courts Task Force on December 4, 1990. The task force held five public hearings throughout the state and received written comments from over 300 people. Additionally, the Task Force contracted the services of the research firm of Selzer Boddy, Inc. to conduct four major studies directed at judges, attorneys, court personnel, and the general public. The Task Force also designated a team of researchers to undertake a special retrospective study of criminal cases to determine the effect of race in the criminal justice process. The perceptions of the general public were elicited via a telephone survey of a cross section of 400

Iowans. Surveys were mailed to 2,114 attorneys across the state, 1600 court employees, and 351 judges. The response rate for the written surveys was high: 84% for judges, 54% for attorneys, and 43% for court employees.

FINDINGS

In each case, there are unexplained differences which are not associated with any known factor but race.

The Task Force believes the uniform use of pretrial release guidelines would decrease the arbitrary or subjective nature of pretrial release decisions.

The Task Force has discovered that information is not easily retrievable throughout the state to permit study of possible race bias in the court system The benefit derived from the uniform collection of such information from all stages of the criminal process is significant.

The State should maintain a centralized data base that includes information on defendant race, victim race,....along with the range of legal and social variables included in the present study. This would allow periodic monitoring of charging and sentencing discrepancies along racial lines.

The Task Force believes that a collections system data base needs to be established on an ongoing basis to gather the facts necessary to initiate, at any time, an examination and analysis of disparate incarceration rates among adults and juveniles. Otherwise, it will be necessary to conduct expensive and time-consuming criminal case studies; such case studies cannot be done throughout the state efficiently or on an ongoing basis.

RECOMMENDATIONS

The results of the Criminal Case Study should be discussed

at the annual judges conference. The present and future court system database should be monitored periodically, and patterns of racially associated disparities noted, publicly disseminated, and specifically brought to the attention of Districts where disparities occur.

County attorney offices should be required to keep records of the charges on initial arrest, the charges ultimately filed, the arrests they chose not to prosecute, the reasons they chose not to prosecute, and the race and gender of the alleged perpetrators.

MASSACHUSETTS SUPREME JUDICIAL COURT COMMISSION TO STUDY RACIAL AND ETHNIC BIAS IN THE COURTS, FINAL REPORT, SEPT. 1994

The Commission was created on August 2, 1990 by the Justices of the Massachusetts Supreme Judicial Court. The impetus for the Commission's creation was an incident that occurred in Suffolk Superior Court in August 1988. During a criminal session of Suffolk Superior Court, two court officers mistook Assistant Attorney General Thomas H. Brewer, an African American, for a defendant and attempted to bar him, in an inappropriate manner, from gaining access to a part of the courtroom that he was entitled to enter. The resulting publicity highlighted the issue of racial bias in Massachusetts courts. In the Spring of 1990, the Chief Justice, responding to growing public concern, met with bar association leaders to discuss the need for a study. The Commission was formed following the meeting.

The Commission held seven public hearings and focus group meetings across the state to solicit a wide range of public input. The Commission also surveyed the bench and bar members, conducted an extensive research project on the racial composition of jury pools and juries, and examined the effect of bias on sentencing. An attorneys'

survey was sent to 4,542 attorneys. A judges' survey was sent to 328 judges. The response rates were 56% and 80% respectively.

RECOMMENDATIONS

The Supreme Judicial Court should undertake, on its own or through the Massachusetts Sentencing Commission, a comprehensive study of sentencing patterns to determine whether there is any disparity related to racial/ethnic bias. A sentencing study should include a detailed analysis of the sentencing patterns of young male offenders. This analysis should be conducted on serious crimes committed by white, black/African American, Hispanic and Asian American males by comparing the rates of incarceration and sentence length across these groups.

The Trial Court should produce and distribute regular reports of sentencing patterns by race and ethnicity. The Office of the Commissioner of Probation, the Committee for Public Counsel Services, the District Attorneys' offices, the Trial Court and local police departments should develop coordinated information systems which will allow comparison of the data each has collected. The District Attorney's office for each county should be the primary agency responsible for collecting the data on case processing.

MICHIGAN SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE COURTS, FINAL REPORT, DEC. 1989

The Task Force was created on September 15, 1987 by the Michigan Supreme Court. The Task Force focused its investigations on seven major areas: judicial behavior, court treatment, court employment practices, ethics, attorney

behavior, criminal justice and jury processes. The Michigan Supreme Court Task Force was the first of its kind in the nation.

The Commission was created after the Michigan Supreme Court Citizens' Commission to Improve Michigan Courts called for the creation of task forces on gender and racial/ethnic issues in the courts in 1986. The Citizens' Commission had found that a significant and disturbing perception existed among Michigan citizens: Over one-third believed that individuals were discriminated against in the Michigan court system on the basis of their gender, race or ethnic origin.

The task force held public hearings in eight cities throughout the state. In addition, it surveyed a random sample of 900 attorneys who practiced in the courts. The response rate was 45.6%. It also conducted a survey of 574 judges with an overall response rate of 45%.

FINDINGS

That trial judges should be encouraged to implement the Batson standard on their own initiative in any jury selection process in which peremptory challenges appear to be racially motivated.

RECOMMENDATIONS

The Michigan Supreme Court should conduct a study similar to that done in the felony sentencing project of actual bail practices to investigate the question of disparity in bail practices by race, ethnicity, gender, economic class and region and to establish a process to develop recommendations in the event that disparity is statistically shown.

Current analysis of sentencing should include factors relating

to the impact of and interrelationship of:

- a. misdemeanor convictions and sentences
- b. race, ethnic background and gender of the judge
- c. race, ethnic background and gender of the victim
- d. race, ethnic background and gender of the defendant
- e. guideline departures

All judges should receive an analysis of their own sentencing practices on an annual basis.

NEW JERSEY SUPREME COURT TASK FORCE ON MINORITY CONCERNS, FINAL REPORT, JUNE 1992

The Task Force was created in September 1985. The purpose of the task force was to critically examine the concerns of minorities with their treatment in the courts and to propose solutions to identified problems. The Task Force was created after Chief Justice Robert Weientz met with representatives of the Coalition of Minorities in the Judiciary in the summer of 1983. The Coalition was an organization founded in 1980 to address issues of concern to racial minorities in the judiciary and to make recommendations to the Chief Justice, the Supreme Court, and the Administrative Director of the Courts on ways to address problems relating to minority concerns. As a result of the meeting, the Chief Justice convened a Committee on Minority Concerns for the purpose of addressing the concerns of the Coalition. After reviewing the Committee's report, in September 1985, the Task force was created.

The Task Force retained several independent research consultants to execute a wide-ranging research program. The Task Force also met with representatives of bar associations, administrators of key public and private agencies involved with the administration of justice, and conducted telephone surveys. Thirteen public hearings were held at different locations around the state. Written testimony was also taken.

A judicial survey aimed at capturing perceptions of bias in the justice system was undertaken. Of the 340 Superior Court judges attending the Judicial College, nearly 50% returned the questionnaire. The response rate for court administrators attending the Judicial Staff College was 61%.

RECOMMENDATIONS

The Supreme Court should require that all rules and directives regarding bail be reviewed and revised in order to promulgate procedures to be applied uniformly statewide.

The Chief Justice should consider approaching the Attorney General to explore the possibility of jointly sponsoring an empirical analysis of recent New Jersey samples of bail and sentencing outcomes, controlling for key factors that influence the outcomes of these decisions, examining the possibility of cumulative discrimination effects over the sequence of decisions from arrest through sentencing, and determining the degree to which discrimination occurs at each of those decision points.

REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, EXECUTIVE SUMMARY, APR. 1991

The Commission was formed on January 21, 1988 by Chief Judge Sol Wachtler. The mandate of the Commission was to examine the courtroom treatment of minorities, review the representation of minorities in nonjudicial positions within the courts, and review the selection processes for judges.

The Commission was created after members of the Coalition of Blacks in the Courts met with the Chief Justice in 1987 to discuss both the despair felt by judges, nonjudicial officers and litigants regarding the treatment of Blacks in the

courts and the underrepresentation of Blacks within the judiciary and the legal profession.

The Commission held four public hearings throughout New York state. Additionally, the Commission held a series of public meetings in each county with a minority population of at least 10%, met with most judges in the state, met with court administrators, and met with leaders of various bar and community associations.

The Commission conducted an attorney survey. Of the 840 attorneys surveyed, 81% responded. The Commission also conducted a survey of the 1,129 judges in the State. The response rate was 57%.

RECOMMENDATIONS

Judges should review their bail and sentencing decisions to ensure that they are fair and not influenced by racial or ethnic stereotypes.

Sentencing statistics concerning the race of victim, defendant and complainant should be maintained along with case outcome and should be published by the Unified Court System in cooperation with the New York State Division of Criminal Justice Services.

Judges should exercise heightened scrutiny to ensure that peremptory challenges are not used improperly in the voir dire process.

The Commission on Judicial Conduct should give complaints of racial bias high priority and keep records of its investigations and disposition of charges in a manner permitting analysis of whether there were any patterns of racial or ethnic discrimination.

**OREGON SUPREME COURT TASK FORCE, REPORT
ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL
SYSTEM, MAY 1994**

The Oregon Supreme Court Task Force was established by the Oregon Supreme Court on February 21, 1992. The task force was created to identify problems faced by racial and ethnic minorities in the judicial system and to propose a course of action to address the problems and concerns.

The Task Force gathered information from testimony at nine public hearings throughout the state. Additionally, 7,525 persons who use the court system were surveyed regarding issues of race and ethnicity in the Oregon court system. Surveys were sent to 5,438 judges, court personnel, and attorneys. The response rate was 40%. In addition to the extensive survey research, prior research, and written comments submitted to the task force were analyzed.

FINDINGS

Peremptory challenges, eliminating individuals from serving on juries, are used solely because of the race or ethnic background of prospective jurors.

In the criminal justice area, the evidence suggests that, as compared to similarly situated nonminorities:

- minorities are more likely to be arrested,
- minorities are more likely to be charged,
- minorities are less likely to be released on bail,
- minorities are more likely to be convicted,
- minorities are less likely to be put on probation,
- minorities are more likely to be incarcerated.

In the juvenile justice system:

- minorities are more likely to be arrested,
- minorities are more likely to be charged with delinquent acts,
- minorities are more likely to be removed from their

family's care and custody,
 minorities are more likely to be remanded for trial as adults,
 minorities are more likely to be found guilty of delinquent acts,
 minorities are more likely to be incarcerated,
 minorities lack experts sensitive to the cultural differences of minorities.

RECOMMENDATIONS

District attorneys should be required to collect and report to the Criminal Justice Council data on the variable of race in all charging decisions.

The legislature should direct the Criminal Justice Council to develop uniform charging standards to be used by all prosecutors in Oregon. The uniform standards should be sufficiently detailed to provide meaningful limits on prosecutorial discretion and to enable judicial review. The Criminal Justice Council should be directed to report biannually to the legislature on the implementation of the standards.

The Chief Justice should require trial judges, in rendering pretrial release decisions, to use uniform forms that include the race of defendants.

The legislature should direct the Criminal Justice Council to study and report the extent to which the race of a defendant affects the outcome of a pretrial release decision, either in the decision whether to release on personal recognizance or in the conditions of release.

Because of the immense help that its statistics have been to this task force, and because it is imperative that such statistics be available in the future, the Criminal Justice

Council should continue to study and report on racial disparities in sentencing.

WASHINGTON STATE MINORITY AND JUSTICE TASK FORCE, SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS, DEC. 19, 1990

The Task Force was established in 1987 pursuant to legislation which sought to improve the treatment of racial and ethnic minorities in Washington courts. The Task Force held public forums around the state in 1988 and undertook research studies.

The Washington Supreme Court created the Minority and Justice Commission in October 1990 in acknowledgment of the importance of the continuing need to determine whether racial, ethnic and cultural bias exists in the state court system and, when it exists, to recommend appropriate action to overcome it. The Commission's purpose was to continue the work of its predecessor, the Task Force, by implementing the Task Force Recommendations.

The data for the Commission's study on race and ethnic disparities in the prosecution of felony cases in King County came from three sources: (1) an automated database used by the Office of the King County Prosecuting Attorney; (2) case files for a sample of approximately 500 felony cases filed with the King County Superior Court during 1994; and (3) personal interviews with 15 King County deputy prosecuting attorneys.

FINDINGS:

The filing of felony charges by the King County Prosecutor's Office varies by the type of offense and by the race of the offender . . . White offenders were the least likely to be charged (60%), compared to 65% of all minority offenders.

First, the effect of race, particularly African American, on bail was significant in most analyses...Second, there were significant differences in the amount of confinement recommended for Black offenders and White offenders, and deputy prosecutors were less likely to recommend an alternative sentence conversion for Black offenders.

[C]ontrolling for legal factors, African Americans tend to receive higher sentences than Whites and are less likely to be provided an alternative sentence conversion.

CALIFORNIA JUDICIAL COUNCIL ADVISORY COMMITTEE ON RACIAL AND ETHNIC BIAS IN THE COURTS, FAIRNESS IN THE CALIFORNIA STATE COURTS.

The Advisory Committee on Racial and Ethnic Bias in the State Courts was appointed in 1991 by Chief Justice Malcolm Lucas.

The Committee conducted 13 days of public hearings to ascertain public perceptions of fairness in the judicial system. After the hearings, a survey was completed in order to verify the extent to which the concerns expressed in the public hearings were shared by the general public, attorneys, and court personnel. The survey of the general public consisted of a random sample of 1,338 people. Approximately 2,070 written questionnaires were mailed to all judicial officers and top administrators of the courts. Another 2,000 questionnaires were mailed to minority and non-minority attorneys.

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No. 95-157

IN THE
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OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *Petitioner,*

v.

CHRISTOPHER LEE ARMSTRONG, *et al.,*
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF OF WASHINGTON LEGAL FOUNDATION,
MARYLAND COALITION AGAINST CRIME, INC.,
PARENTS ASSOCIATION TO NEUTRALIZE
DRUG AND ALCOHOL ABUSE, INC., AND
ALLIED EDUCATIONAL FOUNDATION AS
AMICI CURIAE IN SUPPORT OF PETITIONER

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Date: December 14, 1995

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Pursuant to Rule 37.3 of the Rules of this Court, the Washington Legal Foundation, the Maryland Coalition Against Crime, Inc., the Parents Association to Neutralize Drug and Alcohol Abuse, Inc., and the Allied Educational Foundation respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioner. Counsel for

Petitioner has consented to the filing of this brief, as have counsel for Respondents Robert Rozelle, Aaron Hampton, Freddie Mack, and Shelton Auntwan Martin. *Amici* have been unable to obtain the written consent of counsel for Respondent Christopher Lee Armstrong (albeit counsel for Mr. Armstrong did provide oral consent), thereby necessitating the filing of this motion.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with more than 100,000 supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to reform of the criminal justice system and the cause of victims' rights. To that end, WLF has appeared before this Court as well as other federal and state courts in cases addressing criminal law issues (*see, e.g., Davis v. United States*, 114 U.S. 2350 (1994); *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Payne v. Tennessee*, 501 U.S. 808 (1991)), as well as in cases addressing efforts to control the sale and use of illegal drugs. *See, e.g., Vernonia School District 47J v. Acton*, 115 S. Ct. 2386 (1995).

The Maryland Coalition Against Crime (MCAC) is based in Baltimore, Maryland and works for enactment of legislation that promotes tougher law enforcement measures and the rights of crime victims. It has devoted considerable resources toward adoption of the "Victims' Rights Amendment" to the Maryland Constitution.

The Parents Association to Neutralize Drug and Alcohol Abuse, Inc. (PANDAA) is a national organization devoted to eliminating drug use among young people. PANDAA works toward this end by sponsoring anti-drug classes and seminars, by distributing informational

materials, and by helping families with drug abuse problems in finding effective treatment.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as history, law, and public policy, and has appeared as *amicus* before this Court in a number of cases involving criminal law issues.

Amici are deeply concerned by the crack cocaine epidemic that has spread throughout the nation during the past decade. They support strong law enforcement efforts as a principal means of bringing that epidemic under control. They are concerned that the Ninth Circuit's decision, if allowed to stand, will undermine those efforts and will force prosecutors to bring charges in accordance with racial quotas in order to avoid selective prosecution claims.

Amici seek to file the attached brief because of their interest in promoting the safety and welfare of all segments of our society; they have no direct interest in the outcome of this case or of other cases raising similar issues and believe that they can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, *amici curiae* WLF, MCAC, PANDAA, and AEF respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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December 14, 1995

QUESTION PRESENTED

Whether the court of appeals erred in holding that evidence that members of a particular race have been prosecuted for a particular offense is sufficient to justify an order requiring discovery from the government on a claim of selective prosecution, absent some evidence that prosecutors brought charges on the basis of race -- such as evidence that similarly situated persons of a different race have not been prosecuted for that offense.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTERESTS OF THE <i>AMICI CURIAE</i>	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. RESPONDENTS FAILED TO PRODUCE ANY EVIDENCE FROM WHICH ONE COULD INFER THAT THEY WERE SELECTIVELY PROSECUTED ON THE BASIS OF RACE	5
A. The FPD Affidavit Points to No Valid Comparison Pool or Evidence that Those Similarly Situated Were Not Charged	7
B. Statistical Evidence of Racial Disparities Is Insufficient as a Matter of Law to Demonstrate Selective Prosecution	13
II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN ORDERING DISCOVERY	16
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Bordenkircher v. Hayes</i> , 434 U.S. 357 (1978)	6
<i>Imbler v. Pachtman</i> , 424 U.S. 409 (1976)	18
<i>McCleskey v. Kemp</i> , 481 U.S. 279 (1987)	13-15, 17, 18
<i>Oyler v. Boles</i> , 368 U.S. 488 (1962)	6
<i>United States v. Goodwin</i> , 457 U.S. 368 (1982)	5-6
<i>United States v. Turner</i> , No. CR 94-820 JSL, ____ F. Supp. ____, 64 U.S.L.W. 2276 (Oct. 12, 1995)	18
<i>Wade v. United States</i> , 504 U.S. 181 (1992)	19
<i>Wayte v. United States</i> , 460 U.S. 598 (1985)	5-7, 9, 12
<i>Whitus v. Georgia</i> , 385 U.S. 545 (1967)	7
Constitutional Provisions and Statutes:	
5th Am., U.S. Const.	6
14th Am., U.S. Const., Equal Protection Clause	13, 14
18 U.S.C. § 924(c)	2
21 U.S.C. § 841	3, 11
21 U.S.C. § 846	2, 3
Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e, <i>et seq.</i>	14

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INTERESTS OF THE *AMICI CURIAE*

The interests of the *amici curiae* are set out fully in the
Motion for Leave to File accompanying this brief.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby
adopt by reference the Statement contained in Petitioner's
brief.

In brief, Respondents Christopher Lee Armstrong, Robert Rozelle, Aaron Hampton, Freddie Mack, and Shelton Auntwan Martin were indicted in 1992 in the United States District Court for the Central District of California on charges of conspiring to possess with intent to distribute, and conspiring to distribute, more than 50 grams of cocaine base (crack), in violation of 21 U.S.C. § 846. Four of the five Respondents were also charged with using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c). Petition Appendix (Pet. App.) at 4a, 55a. According to the indictment, Respondents sold a total of 124.3 grams of cocaine base to confidential informants on seven occasions between February and April 1992; the informants reported that Respondents used multiple firearms during the sales. *Id.*, at 70a.

All of the Respondents are African American. They allege that the government has selected them for prosecution in federal court precisely because of their race.¹ In September 1992, the district court ordered the government to provide discovery to Respondents with respect to that allegation. *Id.*, at 5a. When the government informed the district court that it would not comply with the discovery order, the court in January 1993 dismissed the indictments as a sanction. *Id.*, at 7a. In 1994, a three-judge panel of the United States Court of Appeals for the Ninth Circuit reversed the dismissal of the indictment, finding that Respondents had failed to make a sufficient showing of

¹ If convicted, Respondents face ten-year minimum sentences on the drug charges and five-year minimum sentences on the firearms charges. Their potential sentences would have been considerably shorter had they been charged in state court.

selective prosecution to warrant a discovery order. *Id.*, at 68a-104a. The Ninth Circuit subsequently voted to rehear the case *en banc*; and in March 1995, the appeals court voted 7-4 to affirm the district court's dismissal of the indictment. *Id.*, at 1a-67a.

Respondents based their initial motion for discovery solely on an affidavit prepared by a paralegal employed by the Federal Public Defender for the Central District of California ("FPD"). The affidavit asserted that in all 24 cases closed by the FPD's office during 1991 involving cocaine base violations of 21 U.S.C. § 841 and/or 21 U.S.C. § 846, the defendants were black. *Id.*, at 71a. On the basis of that affidavit, the district ordered the government to: (1) provide a list of all cases from the prior three years in which the government charged both cocaine base offenses and firearm offenses; (2) identify the race of the defendants in those cases; (3) identify whether state, federal, or joint law enforcement authorities investigated each case; and (4) explain the criteria used by the office of the U.S. Attorney for the Central District of California for deciding whether to bring cocaine base charges federally. *Id.*, at 71a-72a.

On September 16, 1992, the government moved to reconsider the discovery order and attached to its motion several affidavits that attempted to explain its drug-charging policy. In responding to the motion to reconsider, Respondents attempted to bolster their selective prosecution argument with two additional declarations. The first declaration, made by one of the defense attorneys, stated that she had been told by a halfway house intake coordinator that in his experience treating cocaine base addicts, whites and blacks dealt and used the drug in equal numbers. *Id.*, at 6a. The second declaration, made by

another defense counsel, asserted: (1) he had represented only blacks in federal court on cocaine base charges; (2) he had never heard of nonblacks being prosecuted in federal court on cocaine base charges; and (3) in his conversations with unnamed state court judges, prosecutors, and defense attorneys, he had come to believe that California prosecutes many nonblack cocaine base offenders in state court. *Id.*, at 6a, 73a. The defendants also submitted a Los Angeles Times article which contended that blacks disproportionately commit cocaine base offenses. *Id.*

It is not clear from the district court's order whether she considered Respondents' additional declarations in denying the government's motion for reconsideration of the court's discovery order. The Ninth Circuit, however, did rely on those declarations to a considerable extent in affirming dismissal of the indictments. *See, e.g., id.*, at 22a-23a.

The Court granted the government's petition for a writ of certiorari on October 30, 1995, to consider whether the evidence submitted by Respondents was sufficient, as a matter of law, to justify a discovery order regarding Respondents' selective prosecution allegation.

SUMMARY OF ARGUMENT

Respondents contend that their indictments were improper because the indictments were the product of a racially discriminatory charging decision. However, the evidence of racially discriminatory intent submitted by Respondents to the district court does not begin to meet the heavy evidentiary burden that must be met before discovery is permissible. While Respondents have demonstrated that the overwhelming majority of those charged with cocaine

base offenses in the Central District of California are African American, there is no basis for inferring that racial discrimination is at work in the absence of a "comparison pool" to which the pool of federal cocaine base defendants can be compared. There is no reason to assume that cocaine base offenses will be equally prevalent among all racial groups in this country -- or even that there will be a rough equivalence.

Moreover, even if Respondents could demonstrate that the current system by which offenders are assigned to state and federal court is racially discriminatory, Respondents would still not be entitled to relief in the absence of evidence that they personally were victims of racial discrimination. This Court has made clear that -- except in limited contexts not applicable to this case -- courts should not infer that a litigant has been the victim of racial discrimination based on evidence that others similarly situated have been discriminated against.

In the absence of evidence from which racial discrimination can be inferred, the district court's discovery order must be reversed; that is true regardless what standard of review one applies to the district court decision.

ARGUMENT

I. RESPONDENTS FAILED TO PRODUCE ANY EVIDENCE FROM WHICH ONE COULD INFER THAT THEY WERE SELECTIVELY PROSECUTED ON THE BASIS OF RACE

In our criminal justice system, the government "retains 'broad discretion' as to whom to prosecute." *Wayte v. United States*, 470 U.S. 598, 607 (1985)(quoting *United*

States v. Goodwin, 457 U.S. 368, 380 n.11 (1982)). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

This Court's reluctance to impinge on the executive branch's prosecutorial discretion rests on sound public policy principles. As the Court recognized in *Wayte*:

[T]he decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.

Wayte, 470 U.S. at 607.

One narrow limitation on the government's prosecutorial discretion is that, under the equal protection component of the Fifth Amendment, the government may not select whom to prosecute "based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962). A

defendant alleging that he is the victim of unconstitutional selective prosecution must, however, meet the exacting evidentiary standards imposed on anyone asserting an equal protection claim. *Wayte*, 470 U.S. at 608. In particular, anyone asserting that he has been selected for prosecution on the basis of race must demonstrate that the prosecutor acted with a racially discriminatory purpose and would not have brought charges but for the defendant's race. *Id.* at 608-09.

A. The FPD Affidavit Points to No Valid Comparison Pool or Evidence that Those Similarly Situated Were Not Charged

None of the evidence submitted by Respondents to the district court comes close to raising even a colorable basis for believing that they were selected for federal court prosecution because they are African American. The piece of evidence upon which Respondents most strongly rely (and which was the sole basis for the district court's initial discovery order) was the affidavit indicating that all 24 cocaine base cases closed by the FPD's office in 1991 involved black defendants. As the Ninth Circuit dissenters cogently explained, that statistic provides absolutely no grounds for an inference that the U.S. Attorney's office was making racially discriminatory charging decisions.

First, while the Court has on occasion permitted an inference of racially discriminatory intent based on statistical evidence, such an inference is permissible only when the proponent can demonstrate a disparity of some sort in the racial composition of the observed group versus the racial composition one would expect in the absence of intentional discrimination. *See, e.g., Whitus v. Georgia*, 385 U.S. 545, 552 (1967)(racially discriminatory intent

may be inferred where there were only 1/3 as many blacks on grand jury venire as one would expect if veniremen had been chosen randomly from among county residents). Here, Respondents have introduced no evidence regarding the percentage of blacks one would expect to find among FPD clients facing federal cocaine base charges in the absence of racially motivated charging decisions. In the absence of such evidence, there is no basis for concluding that 24-out-of-24 black FPD defendants is evidence of racially discriminatory intent.

The Ninth Circuit tried to sidestep that obvious evidentiary deficiency by asserting:

Given the prevalence of all kinds of drugs throughout our community, at least some crack distributors are likely to be non-blacks. We must start with the presumption that people of all races commit all types of crime. . . absent some compelling contrary evidence, we must assume that crime knows no exclusive race or creed. 6/

6/ Accordingly, the dissent's repeated calls for a "comparison pool" misses the point. . . Certainly, no "comparison pool" is necessary when the record contains statistical evidence tending to show that only members of racial or ethnic minority groups have been prosecuted. Were we to conclude otherwise, we would be accepting unwarranted racial stereotypes. Of course, as we explain, the government is free either to show that the record is incomplete or that a reasonable explanation exists for the statistical evidence. That is what the government has failed to do here.

Pet. App. 19a & n.6. In other words, in order to avoid what it viewed as "unwarranted racial stereotypes," the appeals court reversed the evidentiary burden and imposed on the government the burden of establishing the proper comparison pool. That burden-shifting maneuver was in direct conflict with *Wayte* and other decisions of this Court that have made plain that the evidentiary burden at all times remains with a defendant claiming unconstitutional selective prosecution.

Second, the Ninth Circuit (in the passage quoted above) seemed to make much of the "inexorable zero" -- the absence of *any* non-blacks among those federal cocaine base defendants whose cases were being handled by the FPD's office. However, the government's un rebutted evidence demonstrated that the alleged "inexorable zero" was a statistical mirage: the FPD's office was handling several federal cocaine base cases involving nonblacks during 1991 (those cases just did not happen to close during 1991), and seven federal cocaine base cases involving nonblacks defendants were initiated by the U.S. Attorney's office in 1992 (the year in which charges were first brought against Respondents). See Pet. App. 53a-54a. Viewed in conjunction with the statistical evidence introduced by the government, the FPD affidavit is stripped of all probative value that might otherwise have been derived from a showing that 100% of a "random" cross-section of federal cocaine base defendants were black.

Moreover, Respondents have introduced absolutely no evidence that the 24 cases examined in the FPD affidavit were randomly selected. The Ninth Circuit attempted to bolster the FPD affidavit by asserting that the criterion used to select cases -- cases closed during 1991 -- was "a factor independent of and not correlated with race"; but

that assertion is totally unsupported by the record and is yet another example of the Ninth Circuit's effort to shift the evidentiary burden away from Respondents. Indeed, *amici* would be quite surprised if there was any measure of randomness whatsoever in the FPD's choice of selection criteria. The FPD had an obvious interest in presenting the district court with the starkest racial picture possible, and that interest would be served by examining several groups of cases selected using varied selection criteria and then presenting to the district court the group of cases containing the fewest number of nonblack defendants.²

While Respondents' evidence indicates that the overwhelming number of those facing cocaine base charges in federal court in Los Angeles are black, it does not

² *Amici* do not mean to suggest that FPD personnel acted in any way improperly. It would be well within the bounds of zealous advocacy to utilize whatever case-selection criteria would support Respondents' selective prosecution claim most strongly. *Amici* do suggest, however, that in the absence of evidentiary support, it would be naive to assume that the 24 cases examined in the FPD affidavit were randomly selected.

The use of "cases closed" as a selection criterion seems on its face to be highly unusual — thereby suggesting a nonrandom explanation for the choice of that criterion. Cases are assigned district court numbers based on when they are filed, not when they are closed; thus, if one were seeking an easy way to retrieve a group of cases from a given time period, one would be much more likely to employ a "cases opened" selection criterion. Moreover, if one were really seeking to discover whether there existed a racial pattern in prosecutorial decision-making in a given time-frame (in this case, 1992 — the year Respondents were charged), "cases closed" would be a strange case-selection criterion, because cases selected using that criterion would reflect prosecutorial decisions made over the course of a lengthy time period (in this case, 1988 through 1991).

constitute acceptance of "unwarranted racial stereotypes" to accept the possibility that certain crimes are more prevalent among members of one racial group than among members of other groups. The record evidence strongly supports that hypothesis. For example, Respondents introduced into evidence a Los Angeles Times article indicating that blacks disproportionately commit cocaine base offenses, and that the racial composition of powder cocaine offenders much more closely mirrors the racial composition of the overall population. Pet. App. 73a. The Ninth Circuit dissenters noted numerous other examples: in 1991, whites constituted 100% of those convicted of antitrust law violations nationwide (Pet. App. 67a); while in 1993, black constituted 87.9% of those convicted of federal cocaine base offenses nationwide. Pet. App. 40a n.4. One must conclude either that all U.S. Attorney offices across the country are selectively prosecuting blacks for cocaine base offenses, or that cocaine base offenses are significantly more prevalent in the African American community than among members of other racial groups. *Amici* submit that the first of those two conclusions is not supported by any evidence in this case; accordingly, one cannot reasonably draw any inferences that federal prosecutors in Los Angeles are basing prosecutorial decisions on race from the FPD affidavit.

Finally, even if one were to accept the FPD affidavit at face value, it is simply too small a sample to raise an inference of racially discriminatory motivation in prosecutorial decisions. Only a small percentage of those charged with drug offenses in the Central District of California are represented by the FPD's office; indeed, approximately 2,400 defendants were charged with drug offenses under 21 U.S.C. § 841 in the Central District during the period 1989 to 1992. C.A. Excerpts of Record

75-85. A defendant claiming selective prosecution cannot begin to meet the heavy evidentiary burden imposed upon him by *Wayte* if he relies solely on statistics derived from such a small percentage of the overall pool of cases.

The two declarations submitted by Respondents in connection with the government's motion for reconsideration add nothing to their case. The hearsay statements of the halfway house employee give no indication that the dealers and users with whom he was familiar were at all similarly situated to Respondents (who are alleged to be violent, major distributors of cocaine base). Similarly, the hearsay statements of the unidentified court personnel regarding the racial characteristics of state-court cocaine base defendants makes no effort to compare the conduct of those defendants to Respondents' alleged conduct. In the absence of such comparisons, the declarations provide no evidentiary support for a claim of racial discrimination.

Amici admit that it is theoretically possible for a defendant to prevail on a selective prosecution claim without demonstrating that other, similarly situated individuals were not prosecuted. For example, even if a defendant were the only person known by federal prosecutors to have violated a particular crime, the Fifth Amendment would prohibit prosecutors from deciding to press charges based on prejudice against members of the defendant's racial group. As a practical matter, however, very few defendants in those circumstances would ever be privy to evidence directly demonstrating the prosecutors' discriminatory thought processes. Thus, virtually the only way that a defendant can begin to demonstrate discriminatory intent is to introduce evidence that others similarly situated (similar, that is, but for some irrelevant characteristic such as race) were not charged. Neither the FPD affidavit nor

the two declarations subsequently proffered by defense counsel include any such evidence.

B. Statistical Evidence of Racial Disparities Is Insufficient as a Matter of Law to Demonstrate Selective Prosecution

The deficiencies in Respondents' evidence is much more fundamental than those outlined in the preceding section. Even if Respondent could establish racial disparities in cocaine base prosecutions in the Los Angeles area (i.e., that blacks who have committed cocaine base offenses are more likely than similarly situated whites to be charged in federal court), such evidence would be insufficient to create an inference of selective prosecution in *their particular cases*. In the absence of more direct evidence that Respondents were themselves the victims of racial discrimination, they cannot make out a case of selective prosecution.

McCleskey v. Kemp, 481 U.S. 279 (1987), is highly instructive on this point. *McCleskey* involved a black defendant who had been convicted of first degree murder and sentenced to death in the State of Georgia. Mr. McCleskey argued that his sentence violated, *inter alia*, the Fourteenth Amendment's Equal Protection Clause because Georgia's criminal justice system was much more likely to impose death sentences on those (such as McCleskey) who had killed whites than on those who had killed blacks. Mr. McCleskey supported that argument with an extensive study of Georgia capital cases (the "Baldus Study") that purported to show a strong correlation between the race of the victim and the imposition of a death sentence.

The Court assumed that the Baldus Study was statistically valid (*McCleskey*, 481 U.S. at 29 n.7) but nonetheless rejected Mr. McCleskey's equal protection claim. *Id.* at 291-97. The Court held that evidence that race may improperly have played a role in other death penalty cases did not create an inference that race had played a role in Mr. McCleskey's case. *Id.* at 293. Rather, the Court stated that Mr. McCleskey could succeed on his Equal Protection claim only by offering "evidence specific to his own case that would support an inference that racial considerations played a part in his sentence." *Id.* at 292-93.

The Court acknowledged that in some "limited contexts" it has accepted statistical disparities as proof of intent to discriminate against an individual litigant. *Id.* at 293. The Court cited two such "limited" examples: statistical disparities as proof of intentional racial discrimination in the selection of the jury venire in a particular district, and of discriminatory employment decisions in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* *Id.* at 293-94. But the Court refused to extend its acceptance of statistical disparities to capital sentencing proceedings, because such proceedings are "fundamentally different" from venire-selection and Title VII cases. The Court made clear that one cannot infer from racial statistical disparities an intent to discriminate against an individual litigant except in those cases in which only a "few[]" variables are relevant to the challenged decision." *Id.* at 295. The Court expressed particular reluctance to permit attacks on individual death sentences based on state-wide statistical disparities because prosecutors play a large role in capital sentencing proceedings and there are valid "policy considerations" supporting the "traditionally wide discretion" afforded prosecutors in their decisions regarding whether to seek the

death penalty. *Id.* at 296. The Court noted that prosecutors' "decisions whether to prosecute and what to charge necessarily are individualized and involve infinite factual variations," thereby making it impossible to infer what motivated Mr. McCleskey's prosecutor based on what may have motivated other prosecutors throughout the state. *Id.* at 295 n.15.

McCleskey is on all fours with the instant case and forecloses Respondents' efforts to demonstrate racial motivation based on statistical disparities in the U.S. Attorney's overall charging policies. Even if Respondents could demonstrate that white cocaine base offenders are more likely to be charged in state court than are blacks, *McCleskey* dictates that Respondents would still not be entitled to an inference that prosecutors engaged in racial discrimination in *this* case. There are simply too many variables involved in the charging process to permit an inference that an overall pattern of racial discrimination infected every individual charging decision.

The charges brought against Respondents are not simply run-of-the-mill cocaine base charges. Rather, they are charged with selling more than 124 grams of cocaine base (2 1/2 times the quantity necessary to qualify them for 10-year minimum sentences) on seven occasions over a two month period. They allegedly used guns during the course of those sales. Thus, even if Respondents could demonstrate that the U.S. Attorney's office engages in racial discrimination in deciding whether marginal cases should be sent to federal or state court, such evidence would not suggest that armed, major African American drug dealers (as Defendants are alleged to be) are also the victims of racial discrimination. In the absence of *direct* evidence that prosecutors in *their case* are racially

motivated (or, at a minimum, evidence that armed, major dealers of cocaine base who happen to be nonblack are not being charged in federal court), Respondents cannot begin to make out a selective prosecution claim. The FPD affidavit is woefully inadequate in that regard: in addition to failing to address the issue of which offenders are not being charged in federal court, it simply lumps together all cocaine base offenders whose cases were closed by the FPD's office in 1991 without regard to the severity of the offenses involved.

In sum, Respondents have failed to produce any evidence from which one could infer that they were selectively prosecuted on the basis of race -- and thus Respondents cannot be said to have established a colorable basis for their selective prosecution claims.

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN ORDERING DISCOVERY

In their briefs opposing Petitioner's certiorari petition, Respondents repeatedly noted that the lower courts had not ruled in their favor on the selective prosecution claims but rather had simply ordered discovery on that issue. Petitioners assert that nothing more than a discovery dispute is at issue and that the district court was acting well within its discretion in ordering discovery. *See, e.g.*, Brief of Defendant Martin at 11-16.

Regardless what standard of review one applies to the district court's discovery order, that order cannot stand. There simply is *no* evidence in the record from which one could infer that Respondents were the victims of intentional racial discrimination. In the absence of such evidence, the discovery order (and the subsequent sanction of dismissal)

must be reversed under any conceivable standard of review.

Amici do not agree, however, with Respondents' contention that the district court's decision is subject to review under a lenient abuse-of-discretion standard. As the Ninth Circuit dissent noted (Pet. App. 45a-46a), reversal of a district court discovery order is appropriate where (as here) the district court "does not apply the correct law." In granting discovery, the district court was operating under an erroneous view of the law regarding when an inference of discrimination can be drawn from statistical evidence. The district court concluded that the FPD affidavit created inferences of racial discrimination that were sufficient to create a colorable basis for a selective prosecution claim, a conclusion that runs directly counter to *McCleskey*. It is entirely appropriate for this Court to correct that error of law notwithstanding the deference normally accorded a district court discovery order.

While the certiorari petition did not directly raise the issue of what legal standard a defendant must meet before he is entitled to discovery into the issue of selective prosecution, *amici* suggest that it may be appropriate for the Court to reach that question in light of the confusion it evidently has engendered in the lower federal courts. *Amici* believe that the precise verbal formulation employed (e.g., a "prima facie case" standard, a "colorable basis" in the evidence standard) is of less importance than it is to reemphasize that it is not easy to meet the standard. As the Court recognized in *McCleskey*, it would unduly drain the resources of prosecutors if they are forced to respond to run-of-the-mill selective prosecution claims. *McCleskey*, 481 U.S. at 296 n. 18 ("[I]f the prosecutor could be made to answer in court each time . . . a person charged him

with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law")(quoting *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976)).

While nominally adhering to a "colorable basis" test for permitting discovery in selective prosecution cases, the Ninth Circuit directly repudiated earlier circuit precedent which had stated that "the colorable basis standard sets a 'high threshold' that should rarely justify discovery." Pet. App. 9a. The appeals court indicated that it viewed racially-motivated prosecutions as sufficiently condemnable so as to permit discovery whenever racial discrimination is suspected. The difficulty with that lenient standard is that it invites repeated selective prosecution challenges. The delay that is attendant to any discovery order would virtually always be to the defendant's benefit; the Ninth Circuit's lenient standard thus could quickly bog down prosecutors' offices in "chasing statistics." Pet. App. 67a. Petitioner's brief amply demonstrates that such a chase is already underway in the Ninth Circuit. Indeed, in *United States v. Turner*, No. CR 94-820 JSL, ___ F. Supp. ___, 64 U.S.L.W. 2276 (C.D.Cal. Oct. 12, 1995), a district judge in the Central District of California not only ordered extensive discovery into selective prosecution in a cocaine base prosecution but even suggested that the U.S. Attorney's focus on prosecution of violent street gangs was constitutionally suspect because of the "imbalance" in prosecutions caused by that focus.

This Court appeared to have a much tougher discovery standard in mind when it wrote in *McCleskey* that "a prosecutor need not explain his decisions unless the criminal defendant presents a prima facie case of unconstitutional conduct with respect to his case." *McCleskey*, 481

U.S. at 296 n.18. See also, *Wade v. United States*, 504 U.S. 181, 186-87 (1992)(no discovery permissible into prosecutor's motivation in absence of "substantial threshold showing" that prosecutor acted for impermissible reasons). *Amici* respectfully suggest that the Court take this opportunity to make clear that a prosecutor's normally broad discretion to make charging decisions without being subject to judicial review should not be overcome by anything less than a strong showing that the prosecutor has made racially motivated decisions.

The Ninth Circuit complained that unless a somewhat relaxed standard for granting discovery were adopted, defendants would be unable to gather sufficient information to prove their selective prosecution claims. See, e.g., Pet. App. at 14a. While *amici* concur in that assessment, they see no reason why the threshold for discovery should be lowered simply so that more defendants will escape punishment for their misdeeds. Prosecutors are not engaged in a game in which all participants should be afforded a "sporting chance" of winning. Rather, they are attempting to punish lawbreakers and thereby protect the public from future crimes. Their ability to do so is hampered when they are forced to devote considerable resources to fighting off selective prosecution claims. Racial discrimination among prosecutor should not be countenanced, but defendants who cannot on their own develop strong evidence of such discrimination should not be permitted to rummage through prosecutors' files in hopes of escaping punishment.

CONCLUSION

Amici curiae respectfully request that the Court reverse the decision of the Court of Appeals and direct that Respondents are not entitled to discovery in this case.

Respectfully submitted,

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Dated: December 14, 1995

13

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

Supreme Court. II
FILE

JAN 9 1996

CLERK

No. 95-157

UNITED STATES OF AMERICA,

PETITIONER,

v.

CHRISTOPHER LEE ARMSTRONG, ET AL.,

RESPONDENT.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS AS AMICUS
CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether substantial evidence exists to show gross disproportionality in charging African-Americans with crack offenses supporting a claim of unconstitutional selective prosecution.

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
SUBSTANTIAL EVIDENCE EXISTS TO SHOW GROSS DISPROPORTIONALITY IN CHARGING AFRICAN- AMERICANS WITH CRACK OFFENSES SUPPORTING A CLAIM OF UNCONSTITUTIONAL SELECTIVE PROSECUTION	4
I. THE CONTEXT OF CRACK PROSECUTIONS	5
A. CRACK COCAINE AND POWDER COCAINE ARE ESSENTIALLY THE SAME DRUG	5
B. THE DIFFERENCES IN SENTENCING	6
C. THE RACIAL DISPARITIES IN PROSECUTIONS	11
D. RESPONSES TO ATTACKS ON CRACK PROSECUTIONS AND SENTENCING	18
II. THE EVIDENCE OF SELECTIVE PROSECUTION IS MORE THAN SUFFICIENT TO REQUIRE DISCOVERY OF THE PROCESS AND REASONS FOR PROSECUTORIAL DECISIONS	20
CONCLUSION	24

TABLE OF AUTHORITIES

Cases:	Page
<u>Attorney General of the United States v. Irish People, Inc.</u> , 684 F.2d 928, 948 (D.C. Cir. 1982)	21
<u>Gomillion v. Lightfoot</u> , 346 U.S. 339, 341 (1960)	24
<u>In re Grand Jury</u> , 619 F.2d 1022, 1030 (3d Cir. 1980)	21
<u>St. Germain v. United States</u> , 840 F.2d 1087, 1095 (2d Cir. 1985)	21
<u>United States v. Adams</u> , 870 F.2d 1140, 1146 (6th Cir. 1989)	21
<u>United States v. Armstrong</u> , 48 F.3d 1508, 1512 (9th Cir. 1995) (en banc)	21
<u>United States v. Armstrong</u> , 21 F.3d 1431, 1439 (9th Cir. 1994)	20
<u>United States v. Barnes</u> , CR-92-046-WFN (E.D. Wash.)	13
<u>United States v. Clary</u> , 846 F. Supp. 768 (E.D. Mo. 1994), <u>rev'd</u> , 34 F.3d 709 (8th Cir. 1994)	19,20
<u>United States v. Davis</u> , 864 F. Supp. 1303 (N.D. Ga. 1994)	6,19
<u>United States v. Dumas</u> , CR-93-038-FVS (E.D. Wash.)	13
<u>United States v. Dumas</u> , 64 F.3d 1427, 1431 (9th Cir. 1995)	18,19,20
<u>United States v. Ford</u> , 94-CR-124-2 (D. Col.)	15
<u>United States v. Fraiser</u> , CR-93-039-WFN (E.D. Wash.)	13
<u>United States v. Gordon</u> , 817 F.2d 1538, 1540 (11th Cir. 1988)	21
<u>United States v. Greenwood</u> , 796 F.2d 49, 52 (4th Cir. 1986)	21
<u>United States v. Heidecke</u> , 900 F.2d 1155, 1159 (7th Cir. 1990)	21

<u>United States v. Hickman</u> , CR-93-14021 (S.D. Fla.)	17
<u>United States v. Johnson</u> , 577 F.2d 1304, 1308 (5th Cir. 1978)	21
<u>United States v. Lee</u> , 957 F.2d 778, 783 (10th Cir.), <u>cert. denied</u> , 113 S. Ct. 475 (1992)	10
<u>United States v. Osburn</u> , 955 F.2d 1500, 1507 (11th Cir.), <u>cert. denied</u> , 113 S. Ct. (1992)	10
<u>United States v. P.H.E., Inc.</u> , 956 F.2d 848 860 (10th Cir. 1992)	21
<u>United States v. Parham</u> , 16 F.3d 844, 847 (8th Cir. 1994)	21
<u>United States v. Penagarican-Soler</u> , 911 F.2d 833, 838 (1st Cir. 1990)	21
<u>United States v. Reese</u> , CR-93-817 (S.D. Cal.)	14
<u>United States v. Savinovich</u> , 845 F.2d 834, 839 (9th Cir.), <u>cert. denied</u> , 484 U.S. 1058 (1989)	10
<u>United States v. Turner</u> , 901 F. Supp. 1491, 1494 (C.D. Cal. 1995)	16, 18
<u>United States v. Willis</u> , 967 F.2d 1220, 1226 (8th Cir. 1992)	9

Statutes:

21 U.S.C. §841(b)(1)(A)	passim
21 U.S.C. §841(b)(1)(B)	passim
21 U.S.C. §844	6

United States Sentencing Guidelines:

§2D1.1(c)	6
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-157

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CHRISTOPHER LEE ARMSTRONG, ET AL.,

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On Writ of Certiorari to the United States
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BRIEF FOR THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS AS AMICUS
CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit organization whose membership consists of more than 8,000 lawyers and more than 28,000 affiliate members, including citizens of every state. The lawyer members of NACDL include advocates, law professors, and judges. NACDL is the only private bar organization working on behalf of public and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates.

NACDL is dedicated to the preservation and improvement of our adversary system of justice. Among NACDL's stated objectives are the promotion of the proper administration of criminal justice, the protection of individual rights, and the improvement of criminal law, its practices, and its procedures.

NACDL has appeared as amicus curiae in many cases addressing issues arising out of the administration of federal criminal law, including issues implicating due process, equal protection, Eighth Amendment concerns, discovery procedures, and sentencing matters. NACDL believes the issue presented here is of great significance to the criminal justice system because the decision below provides for basic discovery procedures and remedies for the failure to abide by those procedures, which in turn aid in ensuring protection of important constitutional rights including due process and equal protection. NACDL believes that the Court will benefit from its views on this important issue.

Petitioner and respondents have consented to the filing of this brief and letters reflecting those consents will be lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

The issue before the Court may narrowly be viewed as whether the court of appeals was correct in affirming the district court's order for discovery and dismissal of the indictment upon the government's refusal to comply. Resolution of that issue, however, must consider the larger context of this nation's drug laws and their enforcement. Defendants before the Court were charged with offenses involving crack cocaine. The structure of law enforcement, prosecution, and sentencing in crack cases must be considered to reach a just resolution.

The severe statutory penalties for crack cocaine are not supported by scientific or social realities. The penalties for crack offenses are substantially more severe than for other drug offenses, including those involving powder cocaine. Combined with the misperception that crack offenses are committed primarily by African-Americans, the end result is that investigative and prosecutorial efforts impermissibly target African-Americans.

Crack is a form of cocaine produced by combining cocaine powder, water and some agent such as baking soda. When heated the cocaine crystallizes into "rocks" which are administered by smoking. The production process takes only a few minutes. Evidence indicates that, although there are some differences in the physiological effects of various means of ingesting cocaine (e.g., smoking, snorting, intravenous), the effects, both in terms of duration and potency, are essentially similar.

Despite the similarities of crack and powder cocaine, crack is punished 100 times more severely than powder. The misperceptions that crack offenses are more serious than powder cocaine offenses and that African-Americans commit crack offenses to a significantly greater extent than whites have several repercussions. More than 90% of federal crack defendants are African-American. When coupled with the disparity in applicable sentencing statutes and guidelines, the end result is that African-Americans are sentenced to substantially longer terms of imprisonment for offenses involving what is essentially the same drug: cocaine.

Defendants across the country have mounted various attacks on the statute, guidelines, and practices of law enforcement and prosecutors. Although some district courts have ruled in favor of

defendants, the courts of appeals, applying a rational basis analysis, have uniformly held that the prosecutorial decisions and the sentencing statutes do not violate the Constitution. With respect to claims of selective enforcement and prosecution in violation of equal protection and due process, courts have consistently concluded that defendants have failed to present evidence of race-based decisions by prosecutors.

Given the climate created by the disparate sentencing treatment of crack and cocaine powder and the disproportionate number of African-Americans prosecuted compared to whites, a colorable claim of improper prosecutorial decisions has been made. Nothing more is, or should be, required for discovery relating to the processes by which these decisions are made. This is particularly true given that the government holds the key to the very evidence the various courts have held to be missing.

ARGUMENT

SUBSTANTIAL EVIDENCE EXISTS TO SHOW GROSS DISPROPORTIONALITY IN CHARGING AFRICAN-AMERICANS WITH CRACK OFFENSES SUPPORTING A CLAIM OF UNCONSTITUTIONAL SELECTIVE PROSECUTION.

Crack cocaine and powder cocaine are essentially the same drug, but the penalties for crack offenses are significantly harsher. African-Americans are disproportionately represented in federal cases involving crack offenses. The statistical evidence of disproportionate prosecutions is sufficient to require discovery of the process by which decisions to prosecute are made.

I. THE CONTEXT OF CRACK PROSECUTIONS

A. CRACK COCAINE AND POWDER COCAINE ARE ESSENTIALLY THE SAME DRUG.

Although the terms "crack" and "cocaine base" are often used interchangeably, crack is in fact only one form of cocaine base, which in turn is only one form of cocaine. See, e.g., United States Sentencing Commission Special Report to the Congress: Cocaine and Federal Sentencing Policy, Feb. 1995 at 12-15 [hereinafter Special Report]. Powder cocaine is produced by dissolving coca paste from coca leaves in hydrochloric acid and water. Potassium salt causes undesired substances to solidify and they are then removed. Finally, ammonia is added to separate the powder cocaine from the solution. The result is cocaine hydrochloride.

Production of cocaine base involves removing the salts added during powder production and returning the substance to essentially a form similar to the coca paste. One method is known as freebase. The powder is dissolved in an alkaloid solution. Various solvents, often ether, are added, producing the solid cocaine base. Because of its complex and dangerous production, freebasing has been largely abandoned.

Crack cocaine is a form of cocaine base that is cheaper, easier, and safer to produce than freebase. Powder cocaine is dissolved in a solution of water and baking soda and boiled. A solid substance forms, which is allowed to dry and then broken into "rocks". The "rocks" are then distributed. Dealers often keep the drug in its powder form and convert it to crack only shortly before distribution.

Powder cocaine is administered by injection, insufflation (snorting), or ingestion. Crack cocaine is used by inhalation (smoking). The major

difference in the effects of the two forms of cocaine, powder and crack, is the speed of physiological and psychotropic effects. Smoking crack results in much more rapid entry to the brain and subsequent effects than does the use of powder cocaine. The type, duration and quality of the effects are similar. Special Report at 22-29 & Table 2.¹

B. THE DIFFERENCES IN SENTENCING

1. Despite the evidence that crack cocaine and powder cocaine are essentially the same drug, Congress and the Sentencing Commission continue to maintain penalties for crack that are grossly disproportionate to powder penalties. Federal law mandates a minimum term of imprisonment of ten years for a violation involving five kilograms of powder. 21 U.S.C. §841(b)(1)(A). Only 50 grams of crack trigger the ten-year mandatory minimum. Similarly 21 U.S.C. §841(b)(1)(B) provides for a five-year minimum term of imprisonment for 500 grams of powder cocaine, but only 5 grams of crack. A five-year mandatory minimum also applies to simple possession of 5 grams of crack cocaine. 21 U.S.C. §844. Section 844 also provides a five-year mandatory minimum penalty for possessing lesser quantities with prior convictions.²

Because the Sentencing Guidelines are driven by the statutory penalties for controlled substances, the guidelines also treat quantities of crack the same as 100 times a similar quantity of powder

¹One district court found the substances, crack and powder, chemically identical and that the different penalties were thus not supported. United States v. Davis, 846 F. Supp. 1303 (N.D. Ga. 1994).

²Other drugs carry a 15-day mandatory minimum for simple possession for an offender who has a prior controlled substance conviction.

cocaine. See U.S.S.G. § 2D1.1(c). For example, a base offense level of 32 applies for 5 to 15 kilograms of powder cocaine. Only 50 to 150 grams of crack results in the same offense level.

Thus, two defendants with the same quantity of cocaine, one with powder and one with crack, will receive significantly different sentences. A defendant with 50 grams of powder cocaine will face no statutory mandatory minimum sentence while a defendant with 50 grams of crack will face a mandatory minimum ten-year term of incarceration. 21 U.S.C. § 841(b)(1)(A). Under the United States Sentencing Guidelines, the base offense level for the powder offender would be 16, but that of the crack offender would be 32. Assuming a Criminal History II for each offender and no mitigating or aggravating factors that would adjust the offense level, the powder offender would have a sentencing range of 24-30 months, while the crack offender would face 135-168 months in prison.

2. These penalties, with the 100 to 1 ratio, were born in the Anti-Drug Abuse Act of 1986. At the time, Congress essentially reacted to news stories of crack distribution in the inner cities and "crack babies" as well as unverified and exaggerated reports concerning the effects of crack and the alleged violence arising from its use. See Hearings before the United States Sentencing Commission on Proposed Guidelines Amendments for Public Comment, Testimony of Eric E. Sterling, President of the Criminal Justice Policy Foundation (Mar. 22, 1993) (process described as "frenzied" and "extraordinary") [hereinafter "Sterling Testimony"]. See also 132 Cong. Rec. S13748 (remarks of Sen. Evans) ("the action over there resembled a Congressional lynch mob more than it did careful legislation").

Typically, such major legislation on serious crime issues would be "referred to a subcommittee, and hearings [would be] held on the bills." Additionally, comments would be invited from "the Administration, the Judicial Conference, and organizations that have expertise on the issue." Instead, the 1986 Act was passed a mere five weeks after introduction with only one brief committee hearing. Sterling Testimony; "Crack" Cocaine: Hearings Before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 99th Cong. 2d Sess. (July 15, 1986). The original proposal offered by the Democrats, in an effort to look "tough on crime," called for a 50 to 1 sentencing ratio between crack and powder cocaine. See H.R. 5394; Sterling Testimony at 4. But, not to be outdone, the Republicans "arbitrarily doubled [the ratio] simply to symbolize redoubled congressional seriousness." Sterling Testimony at 4.

3. In testimony before the United States Sentencing Commission, several witnesses stated the 100 to 1 ratio was not supported by the nature of crack cocaine production and distribution, nor by the pharmacological nature of the drug. See, e.g., U.S. Sentencing Commission, Hearing on Crack Cocaine, Nov. 9, 1993, at 38 [hereinafter "Commission Hearings"] (testimony of Sergeant Brennan) ("[y]ou don't see very much powder on the street at all, no. The powder is made into crack and distributed on the street. . . . It all comes from the same source: the powder."); (testimony of Jerome Skolnick) ("dealers . . . are dealing in powder cocaine. So that distinction just is not a sensible distinction").

Furthermore, crack has never been shown to cause the user to become more prone to violence than powder cocaine. See Commission Hearings at 52 (testimony of Dr. Belenko) ("there is no clear

evidence . . . that the emergence of crack had any kind of gross effect on violent crime rate"). See also Hope Corman, Theodore Joyce and Naci Mocan, "Homicide and Crack in New York City," Searching For Alternatives: Drug-Control Policy in the United States (Hoover Institution Press 1991) at 112, 134 (study of correlation between violent crime and crack cocaine found "only weak evidence of any significant upturn" in violent crimes and concluded that crack is conveniently used to cover up more fundamental causes of violence). "Thus media and public fears of a direct causal relationship between crack and other crimes do not seem confirmed by empirical data." Commission Hearings at 59 (testimony of Dr. Belenko).

In sum, "Congress had no hard evidence before it to support the contention that crack is 100 times more potent or dangerous than powder cocaine." United States v. Willis, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring); see also 132 Cong. Rec. S9788 (daily ed. July 29, 1986) ("the dividing line between crack and powder cocaine is indistinct and arbitrary"). As one doctor concluded, "it doesn't make sense to punish a molecule with a little twist so much more severely than the same molecule in a different scenario[.]. . . and the potential bias for punishing crack cocaine differently than cocaine hydrochloride is a bias towards inner-city America." Commission Hearings at 179 (testimony of Dr. Robert S. Hoffman).

The Sentencing Commission concluded that the 100 to 1 ratio of crack to powder cocaine is too great. See Special Report, Executive Summary at p. I. The Commission found that neither powder nor crack cocaine are physically addictive but both are psychologically addictive. Id. at 181. Most cocaine-related emergency room admissions are related to smoking crack, but most deaths result from injection of powder. Id. at 184. Of

particular interest is the finding that any difference in the association of crack with violent crimes is "systemic." That is, the crime is related to the methods and areas of marketing and distribution and not to the effects of usage. Id. at vii-ix, 185.³

4. The 100 to 1 ratio flies in the face of the general policies of drug enforcement. Courts have found that Congress intended a "market approach" to punishment for drug offenses. This approach focuses "on major traffickers responsible for dealing in very large quantities." United States v. Osburn, 955 F.2d 1500, 1507 (11th Cir.), cert. denied, 113 S. Ct. 223 (1992); see also United States v. Lee, 957 F.2d 778, 783 (10th Cir.), cert. denied, 113 S. Ct. 475 (1992); United States v. Savinovich, 845 F.2d 834, 839 (9th Cir.), cert. denied, 484 U.S. 1058 (1989).

In theory, this "market approach" should punish more severely not only offenders dealing in large quantities, but also those dealing in controlled substances with greater monetary value. However, because the methods of distributing crack and the practices of law enforcement result in prosecution of relatively small-scale street dealers who nonetheless receive draconian sentences, this vaunted market approach is turned on its head.

³Congress chose to maintain the disparities even in light of the scientific evidence that the drugs are essentially the same and growing evidence that the sentencing scheme unfairly punishes African-Americans more severely than whites. After extensive hearings and debate, the United States Sentencing Commission proposed an amendment to the Sentencing Guidelines that would eliminate the distinction between crack and powder cocaine for purposes of establishing offense levels. See "Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary," Amend. No. 5, submitted to Congress May 1, 1995. On October 30, 1995, Congress rejected the amendment. P.L. 104-38, Oct. 30, 1995, 109 Stat. 334.

Not only are the quantities of crack often small, the value in comparison with other drugs is nominal. A few dollars worth of crack will trigger a long sentence. Using data from the United States Drug Enforcement Agency, the Sentencing Commission determined that crack has a street value of approximately \$38.33 per one-third gram (\$105 per gram) compared to \$107 per gram of powder cocaine. Under the sentencing guidelines, \$5,750 worth of crack results in an offense level 32, but \$535,000 worth of powder cocaine is required to reach that offense level. A defendant would have to have over eight million dollars worth of marijuana, with a street value of \$237.57 per ounce, to have a base offense level of 32. Other offense levels require similarly disproportionate values. Special Report at 173, Table 19.

Using the DEA comparative street values, \$535,000 worth of powder cocaine and \$5,750 worth of crack are the quantities (five kilograms of powder and 50 grams of crack) that trigger the mandatory ten-year prison terms under 21 U.S.C. § 841(b)(1)(A). The sentencing scheme for cocaine is thus unrelated to the profitability of trafficking as well as to the lack of significantly different properties in its various forms.

C. THE RACIAL DISPARITIES IN PROSECUTIONS

1. Despite the fact that African-Americans total 12% of this nation's population, 92% of federal crack prosecutions nationwide have involved African-American defendants. See 1992 U.S. Sentencing Commission Monitoring Data Files (April-July 1992); Special Report, Ch. 7. Figures 1 and 2 compare African-Americans in the general population and those charged with crack offenses, infra p. 12.

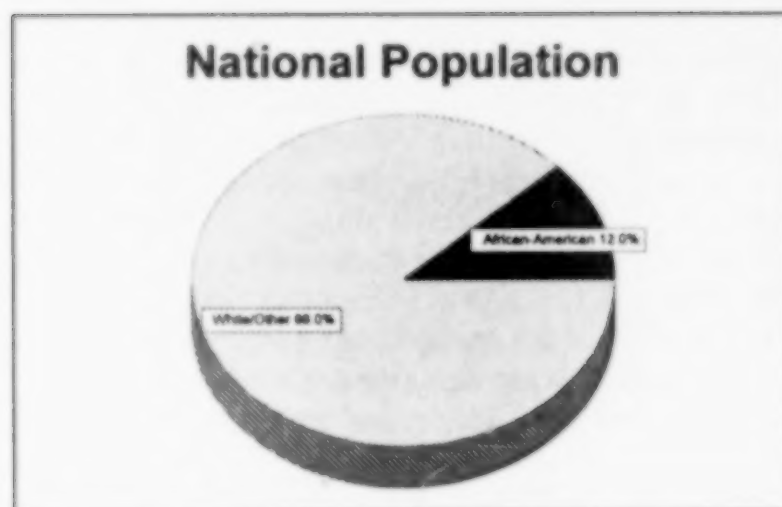


Figure 1

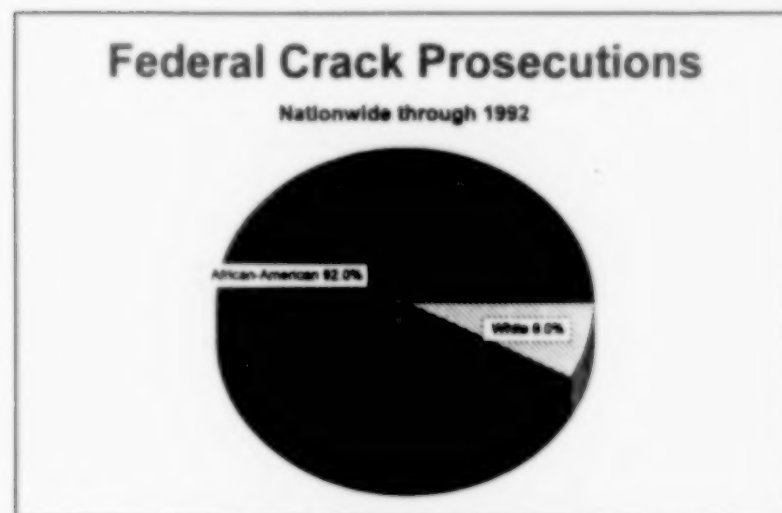


FIGURE 2

The racial disparities in prosecutions cannot be explained by the argument that crack is "an African-American drug" in light of the fact that whites use crack in significant numbers. One survey concluded that 65% of crack users were white. Special Report at 39.

Large scale dealers, both black and white, keep cocaine in powder form until it is ready to be sold.

See, e.g., Commission Hearings at 38 (testimony of Sergeant Brennan) ("[y]ou don't see very much powder on the street at all, no. The powder is made into crack and distributed on the street. . . . It all comes from the same source; the powder."). It is the small scale street dealer, not the large scale dealer, whether Caucasian or African-American, who is arrested on the street. Id.

The use of crack cocaine does not depend on race, but rather on place of residence and neighborhood-level social and environmental conditions. When such conditions are held constant, the pattern of crack use does not differ significantly with race. Special Report at 39.

The national statistics for federal crack prosecutions are mirrored by prosecutions in individual districts. The Eastern District of Washington provides a stark example. In that district, African-Americans comprise approximately one percent of the population, but the percentage of African-American federal crack defendants continues to reflect the national percentage of over 90%. Of 43 crack prosecutions from 1992 to 1994, 39, or [90.7%], were African-American. Only four, or 9.3%, were white. Figure 3, infra p. 14, charts the racial composition of federally prosecuted crack offenders in the Eastern District of Washington.⁴

⁴These statistics were submitted to the District Court during the course of proceedings in United States v. Barnes, CR-92-046-WFN (E.D. Wash.), United States v. Dumas, CR-93-038-FVS (E.D. Wash.), and United States v. Fraiser, CR-93-039-WFN (E.D. Wash.). Each of the defendants in these cases argued the statutes and guidelines governing crack are unconstitutional as enacted and that law enforcement and prosecutors selectively select defendants on a racial basis.

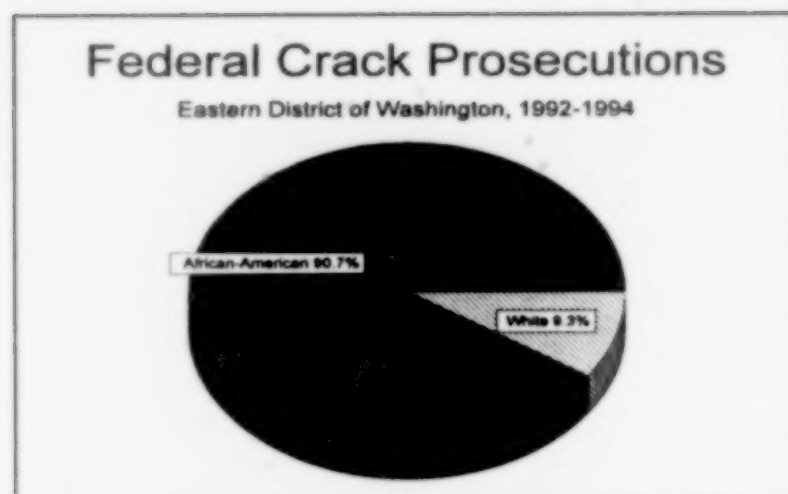


FIGURE 3

Federal prosecutions in other districts reflect that similarly disproportionate numbers of African-Americans are prosecuted for crack offenses. Of 193 prosecutions in the Southern District of California from 1988 to 1993, 168, or 87.1%, of crack defendants were African-American. Cubans of African descent accounted for 12, or 6.2%, of the defendants. One defendant, 0.5%, was Jamaican of African descent. Hispanics numbered 11, or 5.7%. Minorities thus totaled 99.5% of the defendants, while only one defendant, 0.5% of the total was white.⁵ The statistics from the Southern District of California are shown in Figure 4, *infra* p. 15.

⁵Data submitted in *United States v. Reese*, CR-93-817 (S.D. Cal.). As in the cases from the Eastern District of Washington, the defendants in *Reese*, argued, *inter alia*, that crack statutes were selectively prosecuted.

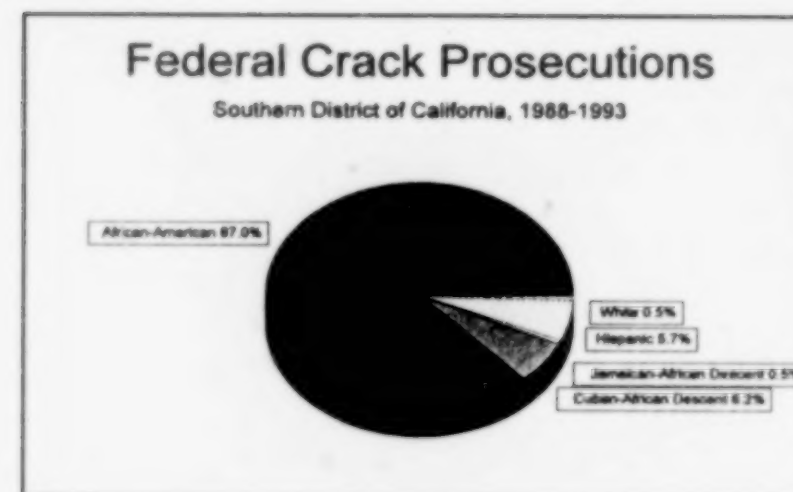


FIGURE 4

In the District of Colorado, of 85 federal crack defendants, 72, or 84.7% were African-American; 6, or 7.1%, were white; and 7, or 8.2% were Hispanic, other, or of unknown race.⁶ See Figure 5.

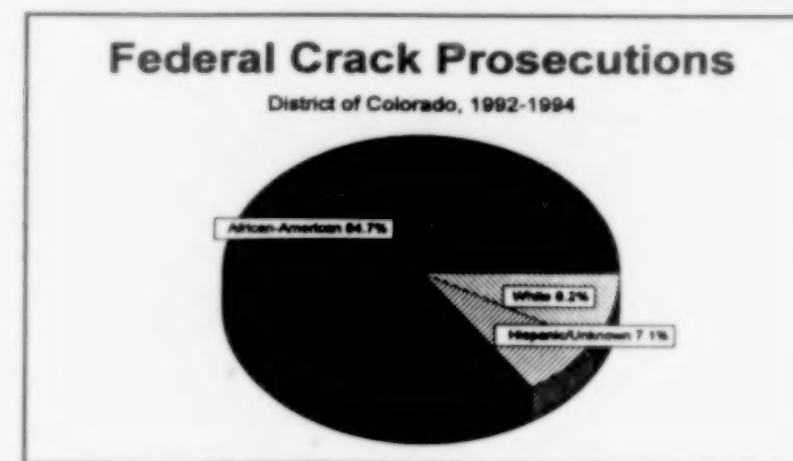


Figure 5

⁶These statistics were submitted in *United States v. Ford*, 94-CR-124-2 (D. Col.).

Possibly more relevant here are additional statistics in the Central District of California, the same district where the case before the Court arose.⁷ Prosecution statistics showed that of 149 defendants who were charged as part of crack cocaine sting operations, 109 (74.7%) were African-American, 28 (19.2%) were Hispanic, 8 (5.5%) were Asian and 1 (0.7%) was white. See Figure 6.

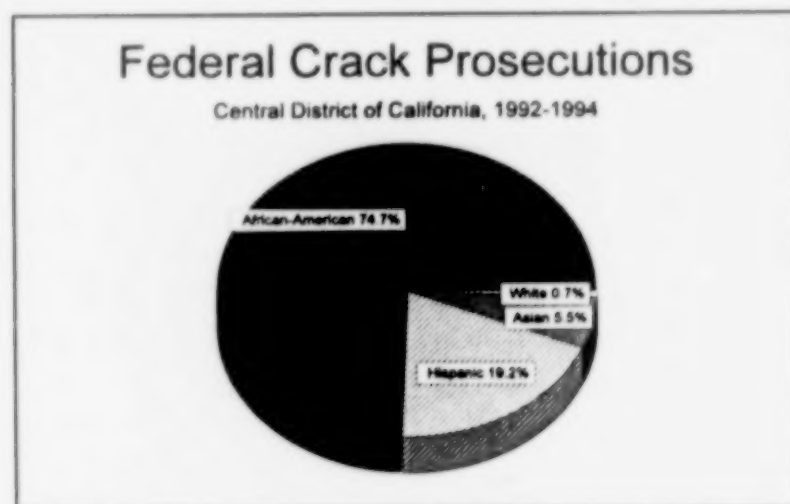


Figure 6

Statistics from two state jurisdictions support the conclusion that more whites are available for prosecution than are prosecuted in federal court. In the Eastern District of Washington, data showed that in state prosecutions in Spokane County, the most populous county in the district, whites accounted for 82, or 28.9%, of 284 crack prosecutions, while African-Americans comprised 193, or 68.0% of the defendants.⁸ This data is summarized in Figure 7, infra p. 17.

⁷This data is taken from United States v. Turner, 901 F. Supp. 1491 (C.D. Cal. 1995).

⁸See supra at n.4.

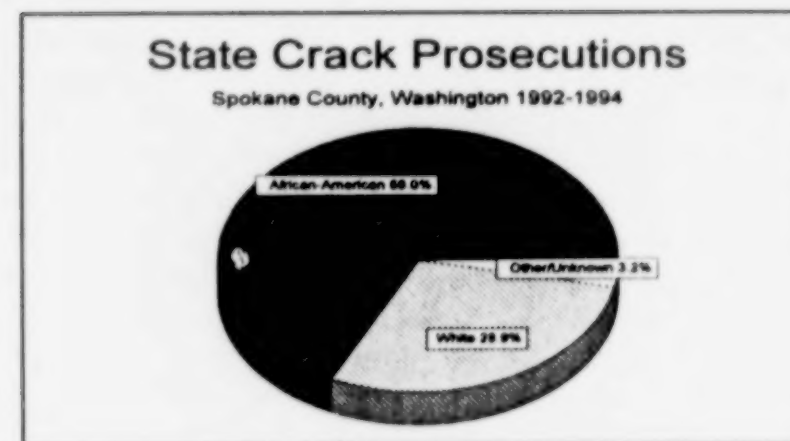


Figure 7

Similarly, as shown in Figure 8, 552, or 19.6%, of 2661 crack defendants in state courts within the Southern District of Florida were white.⁹

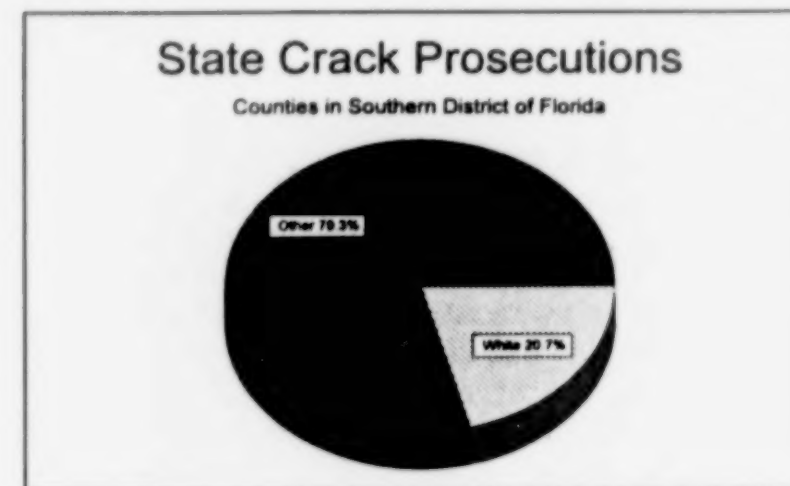


Figure 8

Obviously, crack offenses are not the province of African-Americans to the extent indicated by federal prosecutions.

⁹This data was filed in United States v. Hickman, CR-93-14021 (S.D. Fla.).

This federal and state data shows the marked disproportionality with which African-Americans are prosecuted, convicted and sentenced for crack offenses in federal court. Attempts to explain the disparity between population figures and prosecutions by claims that African-Americans commit crack offenses more than whites cannot explain the gross differences. This is particularly true in light of the evidence that whites commit crack offenses in significant numbers, certainly far greater than the federal prosecution data would indicate.

2. In some cases, the government has attempted to explain the statistical disparities in the racial makeup of federal crack defendants by stating that several criteria are involved in decisions on whether to prosecute federally. According to the government, these criteria include quantity, a defendant's gang membership or affiliation, and whether firearms were involved in the offense. See, e.g., United States v. Dumas, 64 F.3d 1427, 1431 (9th Cir. 1995); United States v. Turner, 901 F. Supp. 1491, 1494 (C.D. Cal. 1995). However, as noted in Turner, these factors may not be race neutral. Introduction of the "gang" factor does nothing to refute a claim of selective prosecution. Blacks are often seen as gang-affiliated on the basis of no real evidence at all. Turner, 901 F. Supp. at 1497 (gang membership is known to be race related); see also New York Times, Dec. 11, 1993, Sect.1, p. 8 ("2 of 3 Young Black Men in Denver Listed by Police as Suspected Gangsters").

D. RESPONSES TO ATTACKS ON CRACK PROSECUTIONS AND SENTENCING

Numerous defendants nationwide have attacked the crack cocaine sentencing structure. They have claimed that the statutes and guidelines are unconstitutional as enacted because they violate

equal protection, due process, and the Eighth Amendment.

Many defendants have cited the process by which the statutory penalties were enacted as evidence that a discriminatory purpose was at the foundation of the statute and that the grossly disproportionate federal prosecution rates between African-Americans and Caucasians was a foreseeable and desired effect of the legislation. See, e.g., United States v. Dumas, 64 F.3d 1427 (9th Cir. 1995); United States v. Clary, 846 F. Supp. 768 (E.D. Mo.), rev'd, 34 F.3d 709 (8th Cir. 1994).¹⁰

Additionally, many defendants have cited prosecution statistics similar to those discussed in the previous section to support arguments that investigation, arrest, and prosecution decisions are racially biased. See Part I, Section C, Figures 1-6.

These claims by various defendants have been almost universally rejected by the courts. Some district courts have ruled in favor of defendants. See United States v. Clary, 846 F. Supp. 768 (E.D. Mo. 1994) (crack penalties violate spirit of equal protection), rev'd, 34 F.3d 709 (8th Cir. 1994); United States v. Davis, 864 F. Supp. 1303 (N.D. Ga. 1994) ("cocaine base" and "cocaine" are identical and Congress established two penalties for the same

¹⁰See 132 Cong. Rec. S4670 (daily ed. April 22, 1986) ("most of the dealers, as with past trends, are black or Hispanic"). The Congressional Record regarding this legislation is replete with references to its goal of targeting minority communities through this legislation. See, e.g., Crack Cocaine: Hearing Before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 99th Cong., 2d Sess., at 58 ("the seller we see is Haitian or black"); 132 Cong. Rec. S809 (daily ed. June 20, 1986) ("the ghetto's legion of unemployed teenagers"); 132 Cong. Rec. S4670 (daily ed. April 22, 1986) ("whites rarely sell the cocaine rocks"). The assertion that whites are not involved in crack offenses is untrue. See supra, Part I, Section C.

substance). Courts of appeals have consistently rejected these claims. The courts have uniformly held that defendants have failed to meet their burden in establishing selective and discriminatory enforcement and prosecution. See, e.g., United States v. Dumas, 64 F.3d 1427 (9th Cir. 1995); United States v. Clary, 34 F.3d 709 (8th Cir. 1994). As with claims that the statute and guidelines themselves are unconstitutional, no court of appeals has held that a defendant was the victim of racially motivated selective enforcement or prosecution.

II. THE EVIDENCE OF SELECTIVE PROSECUTION IS MORE THAN SUFFICIENT TO REQUIRE DISCOVERY OF THE PROCESS AND REASONS FOR PROSECUTORIAL DECISIONS.

As discussed at Part I, Section C, supra, defendants in the instant case submitted statistical data showing a stark racial disparity in prosecutions of crack offenses in the Central District of California. In all of 1991, not one white defendant in this large district was prosecuted federally for a crack offense.

1. Courts have ruled against defendants who have brought claims of selective enforcement and prosecution, finding the claimants failed to provide sufficient proof of their claims. Here, the defendants have sought discovery in order to provide the missing evidence to support their claim. As Judge Reinhardt succinctly framed the issue in dissent in the panel opinion, later withdrawn, "If they could make such a showing without any discovery, there would be no need for discovery in the first place." United States v. Armstrong, 21 F.3d 1431, 1439 (9th Cir. 1994) (Reinhardt, J., dissenting).

A threshold issue in determining whether the discovery order was appropriately entered is the test for determining when discovery is generally

appropriately ordered. A majority of the circuits have adopted the "colorable basis" test. See, e.g., In re Grand Jury, 619 F.2d 1022, 1030 (3d Cir. 1980); United States v. Adams, 870 F.2d 1140, 1146 (6th Cir. 1989); United States v. Heidecke, 900 F.2d 1155, 1159 (7th Cir. 1990); United States v. Armstrong, 4 F.3d 1508, 1512 (9th Cir. 1995) (en banc); United States v. P.H.E., Inc., 956 F.2d 848, 860 (10th Cir. 1992); Attorney General of the United States v. Irish People, Inc., 684 F.2d 928, 948 (D.C. Cir. 1982). A colorable basis is "some evidence tending to show the essential elements of the claim." Heidecke, 900 F.2d at 1159.

Four circuits apply a stricter "prima facie showing" test. United States v. Penagarican-Soler, 911 F.2d 833, 838 (1st Cir. 1990); St. Germain v. United States, 840 F.2d 1087, 1095 (2d Cir. 1985); United States v. Johnson, 577 F.2d 1304, 1308 (5th Cir. 1978); United States v. Parham, 16 F.3d 844, 847 (8th Cir. 1994).

Finally, two circuits have employed a "non-frivolous" standard. United States v. Greenwood, 796 F.2d 49, 52 (4th Cir. 1986); United States v. Gordon, 817 F.2d 1538, 1540 (11th Cir. 1988).

A defendant in a federal case faces the many resources of the United States government. Although the principles of presumption of innocence and proof beyond a reasonable doubt guide the criminal justice system, a defendant is often placed in a position of greatly inferior power compared to that of the government. Considering the vastly differing resources of the parties and the enormous consequences to the accused, and where the data is as stark as it is here, the test for discovery orders should not place an undue onus on defendants.

The government argues that a defendant should be required to make a "substantial" or "significant"

showing of selective prosecution before discovery is permitted. In effect, the standard proposed by the government would require defendants to prove their claim before even being permitted basic discovery. The government's argument, if accepted, would allow prosecutors unfettered discretion at the same time that meaningful review of potential abuses of that discretion is effectively foreclosed.

Regardless of how the test for discovery is formulated, the overwhelming statistics submitted by the defendants in this case surpass even the most stringent of tests. The assertion by the government that there has been no showing of similarly situated defendants not being prosecuted is without merit. The statistical disparities discussed in Part I permit, if not mandate, an inference of the existence of a potential pool of defendants in which whites are represented in far greater numbers than reflected by federal crack prosecutions. Evidence that whites use and deal crack and the fact that state court prosecutions of whites are significantly greater than federal prosecutions supports the inference. This reasonable inference should shift the burden to the government to come forward, through discovery, with information concerning its investigative and prosecutorial practices.

2. To the extent that the evidence as presented does not support an inference of selective prosecution, any evidentiary gaps can be filled only by the government. Only law enforcement and prosecutors have the relevant and necessary information concerning investigations and decisions to prosecute.¹¹ Any additional relevant proof is

¹¹Only law enforcement agencies would know what communities are targeted, which suspects are arrested and which are released. Indeed, federal prosecutors may not see the number of whites investigated or arrested but not presented for federal prosecution. Nonetheless, information concerning investigations or arrests would certainly be available to

only in the hands of the government. Justice requires that the government be compelled to provide the information.

3. The government's argument that requiring discovery in crack cases would open the floodgates to claims of selective prosecution in other offenses is also without merit. First, no other offenses, whether drug-related or not, are comparable to crack offenses for which defendants face draconian punishments as compared to other offenders involved with essentially the same drug. Second, the government should not be permitted to shield itself from accountability for its decisions in one arena by the possibility that scrutiny might lead to discovery of constitutional violations in other arenas.

The discovery process would not, as the government claims, be onerous. The Department of Justice and individual United States Attorneys know what the policies and procedures are that guide the decisions to prosecute. They know what criteria are used to make those decisions. And they have, or could easily obtain from law enforcement, information concerning similarly situated persons who have not been arrested or presented for federal prosecution. A meaningful response from the government would permit the judicial branch to make a more reasoned decision and would not have to be duplicated with each challenge as the government appears to argue.

Assuming that the racial disparities in federal crack prosecutions are accidental outgrowths of legitimate criteria, the government might well be asked why it is so reluctant to share that criteria.

prosecutors. The same information is not available to defendants.

If, as many defendants have claimed, the disparities are due to improper selection, the government must be required to cease those practices.

This Court has stated that statistical disparities can provide "for all practical purposes" a "mathematical demonstration" of intent to discriminatorily enforce and prosecute violations. See Gomillion v. Lightfoot, 346 U.S. 339, 341 (1960). The statistics here must surely be sufficient for the preliminary step of discovery.

CONCLUSION

For the foregoing reasons, the en banc judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

January 11, 1996

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

—vs—

CHRISTOPHER LEE ARMSTRONG, *et al.*,*Respondents.*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**BRIEF AMICUS CURIAE
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& POLICE ORGANIZATIONS, ET AL.
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43 p

AMICI CURIAE

National Black Police Association

NBPA is a nationwide organization of Black police associations dedicated to the promotion of justice, fairness, and effectiveness in law enforcement. It has over 130 member associations representing more than 35,000 individual members, and has previously filed briefs in the Court on matters of significant importance to law enforcement. Cf. Tennessee v. Garner, 471 U.S. 1 (1985).

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF AMICI	1
STATEMENT	2
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. EFFECTIVE CRIMINAL LAW ENFORCEMENT REQUIRES BOTH THE REALITY AND APPEARANCE OF FAIRNESS	8
A. Effective Criminal Law Enforcement Requires the Cooperation of the Community	8
B. The Perception of Race Discrimination in the Administration of Criminal Law Undermines the Effectiveness of Criminal Law Enforcement	11
C. Prosecutorial Discretion Feeds the Perception of Discrimination	15
II. THE "COLORABLE SHOWING" STANDARD ADEQUATELY SAFEGUARDS PROSECUTORIAL DISCRETION	16
III. THE COURT OF APPEALS CORRECTLY APPLIED THE "COLORABLE SHOWING" STANDARD IN THIS CASE	21
A. The District Court Had Sufficient Evidence Before it That Similarly Situated Non-Black Crack Cocaine Offenders Were Not Prosecuted in Federal Court	22

1. The United States Ignores the Full Record Before the District Court	22
2. The United States Concedes That Defendants Need Not Always Show That Similarly Situated Others Were Not Prosecuted to Obtain Discovery	24
B. The Court of Appeals Did Not Rely on a Presumption that Blacks and Whites Distribute Crack Cocaine Equally, But Declined to Adopt a Presumption that Blacks <u>Exclusively</u> Distribute Crack Cocaine	25
C. <u>Batson v. Kentucky</u> , Not <u>McCleskey v. Kemp</u> , Provides Guidance For Reviewing Race-Based Exercises of Prosecutorial Discretion	27
IV. UPHOLDING THE DISCOVERY ORDER HERE WILL NOT OPEN THE FLOODGATES TO SELECTIVE PROSECUTION CLAIMS	29
CONCLUSION	31

TABLE OF AUTHORITIES

<i>Cases:</i>	<i>Pages:</i>
United States v. Bourgeois, 964 F.2d 935 (9th Cir. 1992)	4
Strauder v. West Virginia 100 U.S. 303 (1880)	11
Horton v. Zant, 941 F.2d 1149 (11th Cir. 1991)	12
United States v. Cooks, 52 F.3d 101 (5th Cir. 1995)	18, 30
United States v. Parham, 16 F.3d 844 (8th Cir. 1993)	19
Attorney General v. Irish People, 684 F.2d 928 (1982), cert. denied, 419 U.S. 1172 (1983)	18
American-Arab Anti-Discrimination Comm. v. Reno 70 F.3d 1045 (9th Cir. 1995)	20
Batson v. Kentucky, 476 U.S. 79 (1986)	7, 18, 28
Bird v. Warner, 594 So. 2d 626 (Ala. 1991)	29
Bordenkircher v. Hayes, 434 U.S. 357 (1978)	17
Brady v. Maryland, 373 U.S. 83 (1963)	18
Ex parte Branch, 526 So. 2d 609 (Ala. 1987)	7, 29

Strauder v. West Virginia, 100 U.S. 303 (1880)	11
Gomillion v. Lightfoot, 364 U.S. 339 (1960)	25
Jones v. White, 992 F.2d 1548 (11th Cir. 1993), cert. denied, 114 S. Ct. 727 (1994)	19
Mayberry v. Pennsylvania, 400 U.S. 455 (1971)	15
McCleskey v. Kemp, 481 U.S. 279 (1987)	<i>passim</i>
In re Murchison, 349 U.S. 133 (1955)	11
People v. Ochoa, 165 Cal. App. 3d 885, 212 Cal. Rptr. 4 (1985)	20
Rose v. Mitchell, 443 U.S. 545 (1979)	14
Swain v. Alabama, 380 U.S. 202 (1965)	11
United States Dep't of Labor v. Triplett, 494 U.S. 715 (1990)	23
United States v. Adams, 870 F.2d 1140 (6th Cir. 1989)	20
United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974)	10
United States v. Cammisano, 546 F.2d 238 (8th Cir. 1976)	19
United States v. Catlett, 584 F.2d 864 (8th Cir. 1978)	19

United States v. Falk, 479 F.2d 616 (7th Cir. 1973)	17
United States v. Fares, 978 F.2d 52 (2d Cir. 1992)	18
United States v. Gordon, 817 F.2d 1538 (11th Cir. 1987), vacated in part on rehearing on other grounds, 836 F.2d 1312 (11th Cir.), cert. dismissed, 487 U.S. 1265 (1988)	20
United States v. Goulding, 26 F.3d 656 (7th Cir.), cert. denied, 115 S. Ct. 673 (1994)	19
United States v. Greenwood, 796 F.2d 49 (4th Cir. 1986)	19
United States v. Hintzman, 806 F.2d 840 (8th Cir. 1986)	19
United States v. Jacob, 781 F.2d 643 (8th Cir. 1986)	19
United States v. P.H.E., Inc., 965 F.2d 848 (10th Cir. 1992)	19
United States v. Peete, 919 F.2d 1168 (6th Cir. 1990)	19
United States v. Penagarciano-Soler, 911 F.2d 833 (1st Cir. 1990)	18
United States v. Torquato, 602 F.2d 564 (3d Cir.), cert. denied, 444 U.S. 941 (1979)	19
American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045 (9th Cir. 1995)	20
United States v. Cooks, 52 F.3d 101 (5th Cir. 1995)	18, 30

Wade v. United States, 504 U.S. 181 (1992)	27
Wayte v. United States, 470 U.S. 598 (1985)	<i>passim</i>
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	18, 20

STATUTES

21 U.S.C. §§841 and 846	3
21 U.S.C. §§841 and 846	26
21 U.S.C. §841(a)(1)	2
21 U.S.C. §841(b)	2
21 U.S.C. §846	2

*Miscellaneous:**Pages:*

Robert Jackson, <u>The Federal Prosecutor</u> , 24 J. Am. Judicature Soc'y 18 (1940)	5, 16
Robert Meier and Weldon Johnson, <u>Deterrence as social control: The legal and extralegal production of conformity</u> , 42 Am. Socio. Rev. 292 (1977)	10
Steve McGonigle & Ted Timms, <u>Prosecutors Routinely Bar Blacks, Study Finds</u> , Dallas Morning News, Mar. 9, 1986, at A1	12
Paul H. Robinson, <u>Fundamentals of Criminal Law</u> (2d ed. 1995)	9
Paul H. Robinson, <u>Moral Credibility and Crime</u> , Atlantic Monthly, Mar. 1993, at 72	9

Benno C. Schmidt, Jr., <u>Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia</u> , 61 Tex. L. Rev. 1401 (1983)	11
<u>Developments in the Law -- Race and The Criminal Process</u> , 101 Harv. L. Rev. 1520 (1988)	21
James Vorenberg, <u>Decent Restraint of Prosecutorial Power</u> , 94 Harv. L. Rev. 1521 (1981)	17
Michael Radelet & Glenn L. Pierce, <u>Race and Prosecutorial Discretion in Homicide Cases</u> , 19 Law & Soc'y Rev. 587 (1985)	21
Harold G. Grasmick & Donald E. Green, <u>Legal punishment, social disapproval and internalization as inhibitors of illegal behavior</u> , 71 J. Crim. L. & Criminol. 325 (1980)	10
Steven A. Reiss, <u>Prosecutorial Intent in Constitutional Criminal Procedure</u> , 135 U. Pa. L. Rev. 1365 (1987)	18
Thurman Arnold, <u>Law Enforcement: An Attempt at Social Dissection</u> , 42 Yale L.J. (1932)	15
Marc Maurer and Tracy Huling, <u>The Sentencing Project, Young Black Americans and the Criminal Justice System: Five Years Later</u> (Oct. 1995)	12
Michael Tonry, <u>Malign Neglect: Race, Crime, and Punishment in America</u> 4 (1995)	12
Bureau of Justice Statistics, U.S. Dep't of Justice, <u>Sourcebook of Criminal Justice Statistics -- 1992</u> (Kathleen Maguire et al. eds. 1993)	13
American Bar Association's Section of Criminal Justice, <u>The State of Criminal Justice: An Annual Report</u> 9 (1993)	13

<u>Racial Divide Affects Black, White Panelists,</u> Nat'l L.J., Feb. 22, 1993, at 58-59	14
Ruth Marcus, <u>Racial Bias Widely Seen in Criminal</u> <u>Justice System, Research Often Supports Black</u> <u>Perceptions</u> , Wash. Post, May 12, 1992, at A4	14
<u>Black and White: A Newsweek Poll,</u> Newsweek, Mar. 7, 1988, at 23	14
Jon M. Van Dyke, <u>Jury Selection Procedure:</u> <u>Our Uncertain Commitment to Representative</u> <u>Panels</u> 32 (1977)	14
Bill Minutaglio, <u>Simpson Case Shows Races' Differing</u> <u>Views on Justice: Experience has Taught Blacks to</u> <u>Mistrust the System</u> , Dallas Morn. News, Aug. 6, 1994, at 1A	14
John Hagan & Ruth D. Peterson, "Criminal Inequality in America," in Hagan & Peterson, eds., <u>Crime and</u> <u>Inequality</u> 15 (1995)	15
Richard Berk & Alec Campbell, <u>Preliminary Data on</u> <u>Race and Crack Charging Practices in Los Angeles,</u> 6 Fed. Sent. R. 36 (1993)	21
Cassia Spohn, John Gruhl & Susan Welch, <u>The Impact of</u> <u>Ethnicity and Gender of Defendants on the</u> <u>Decision to Reject or Dismiss Felony Charges,</u> 25 Criminology 175 (1987)	21
Tom Tyler, <u>Why People Obey the Law</u> (1990)	10

No. 95-157

**IN THE
SUPREME COURT OF THE UNITED STATES**
October Term, 1995

UNITED STATES OF AMERICA, *Petitioner,*

-vs-

CHRISTOPHER LEE ARMSTRONG, et al.,
Respondents.

On Writ of Certiorari To
The United States Court of Appeals
For the Ninth Circuit

**BRIEF AMICI CURIAE OF FORMER LAW
ENFORCEMENT OFFICIALS & POLICE
ORGANIZATIONS, ET AL.
IN SUPPORT OF RESPONDENTS**

STATEMENT OF INTEREST OF AMICI¹

Amici are former prosecutors, law enforcement officials, police officers, and law enforcement organizations. Amici and their members have first-hand experience in criminal law enforcement spanning over sixty years all across

¹Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of the Court.

the nation. More specific descriptions of amici are included as an Appendix to this brief.

Amici fully recognize the importance of prosecutorial discretion to effective law enforcement. At the same time, amici believe that the reality and appearance of fairness in the administration of the criminal law is equally critical to effective law enforcement. In particular, where the public believes that prosecutors are selectively enforcing the criminal law on racial grounds, the administration of criminal justice is seriously compromised. Amici are concerned that an unrealistically high standard for discovery on selective prosecution claims will fuel public distrust and cynicism about criminal justice, and will ultimately undermine efforts to provide effective and equal protection of the criminal law to all.

STATEMENT

Respondents are five black males, charged in 1992 with several counts of distribution and possession with intent to distribute of crack cocaine, 21 U.S.C. §841(a)(1), conspiracy to distribute crack cocaine, 21 U.S.C. §846, and using firearms in connection with drug trafficking. 21 U.S.C. §841(b). Defendants sought discovery and/or dismissal of their indictments on selective prosecution grounds. They claimed that black crack offenders were prosecuted in federal court, while non-black crack offenders were prosecuted in state court, where sentences for the same offense are much less severe.

In support of their motion, defendants initially submitted a study of every case involving crack cocaine charges that the Federal Public Defender's Office for the Central District of California had closed in 1991, 1992, and 1993. The study showed that in 1991 every case -- 24 of 24 -

- was against a black defendant. In 1992, 12 of 14 defendants were black, and two were Latino. In 1993, 12 of 15 defendants were black, and three were Latino. Thus, over a three year period, the Public Defender's Office closed cases involving 53 defendants, and not a single one was white. The United States offered no evidence in opposition to the motion.

On the strength of this un rebutted showing, the district court initially ordered limited discovery. It authorized no depositions or production requests, but simply required the government to: (1) provide a list of cases with similar charges from the prior three years, identifying the race of defendants and whether federal or state authorities investigated the case; and (2) explain the U.S. Attorney's criteria for charging.

The United States moved for reconsideration, and supported its motion with three declarations and a list of all defendants charged under 21 U.S.C. §§841 and 846 over a three-year period. The government's evidence indicated that several thousand defendants had been charged under these provisions, but the government could identify no white defendants, and only eleven non-black minority defendants. A declaration from a DEA agent claimed that blacks were disproportionately involved in the distribution of crack cocaine, but did not claim that crack distributors were exclusively black. Another declaration stated that the indictments of defendants fit the general criteria federal prosecutors use to decide whom to prosecute for crack-related offenses.

In response, defendants submitted two declarations. The first related that a halfway house intake coordinator had stated that in his experience treating crack cocaine addicts, whites and blacks dealt and used the drug in equal

proportions. Another, from a defense attorney experienced in state prosecutions, stated that many non-blacks were prosecuted for crack cocaine offenses in state court.

Considering all of this evidence, the district court denied the motion for reconsideration, explaining that without expert testimony, the court could not conclude that the prosecution of exclusively black offenders in federal court was "explained by social phenomena," as the government had argued. The government refused to comply with the discovery order, and after consultation with both parties, the court dismissed the indictments and stayed its order to permit the government to appeal.

On appeal, the en banc Ninth Circuit affirmed the district court's order. The court applied the well-established two-pronged test for selective prosecution, and required defendants to "'present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of government actors.'" *Id.* at 9a (quoting *United States v. Bourgeois*, 964 F.2d 935, 939 (9th Cir. 1992)). It found that "[w]hen all the evidence is taken together, the defendants have established several 'specific facts, not mere allegations, which establish a colorable basis' to believe that the government has engaged in selective prosecution." Pet. App. 26a. As a result, the court held, the district court did not abuse its discretion in ordering limited discovery. *Id.* at 27a.

Although the government's opening brief obscures this fact, the court's decision rested on four pieces of evidence: (1) defendants' showing that over a one-year period, every crack cocaine case closed by the Federal Public Defender Office involved a black defendant; (2) the declaration relating that blacks and whites use and deal

crack cocaine in equal numbers; (3) the declaration relating that non-black crack offenders have been prosecuted in state court; (4) and the government's showing, which could not identify a single white offender among its crack cocaine cases over the prior three years. In light of this evidence, the court concluded, the district court did not abuse its discretion in ordering limited discovery.

SUMMARY OF ARGUMENT

As Justice Robert Jackson, himself a former prosecutor, once said, "The prosecutor has more control over life, liberty and reputation than any other person in America."² While prosecutorial discretion is a critical element of our system of criminal justice, so too is equal protection of the laws. To hold that the district court in this case abused its discretion in finding a "colorable showing" of selective prosecution and ordering limited discovery would sacrifice the principle of equal protection on the mantle of prosecutorial discretion.

Equal protection of the laws, no less than prosecutorial discretion, is a critical component of an effective system of law enforcement. The criminal law depends upon the cooperation of the community, and that cooperation turns on the community's acceptance of the law as legitimate. The criminal justice system will be viewed as legitimate only to the extent that individuals are treated equally by it. Therefore, it is critical that where significant demonstrations of racial inequity are made, the prosecution be required to disclose information sufficient to resolve whether discrimination has in fact occurred.

² Robert Jackson, *The Federal Prosecutor*, 24 J. Am. Judicature Soc'y 18, 18 (1940).

Because prosecutors have such broad discretion in making charging decisions, and because those decisions are generally free from oversight, there is ample room for invidious discrimination. The selective prosecution defense is designed to ensure that prosecutors do not abuse their discretion in a discriminatory fashion. Yet there has not been a single reported federal case of a dismissal for race-based selective prosecution since 1886. And few selective prosecution cases even make it to the discovery threshold. This Court should not make the threshold any more difficult than it already is.

This case involves only the narrow question whether defendants who have demonstrated a stark racial disparity in prosecutorial practices are entitled to limited discovery on their claim of selective prosecution. The court of appeals held only that the government must respond to discovery; it did not hold that plaintiffs have established selective prosecution. It is quite possible that discovery will reveal that the government's actions were fully legitimate. The only question here is whether limited discovery should be authorized, or whether the defendants' showing requires no legal response whatsoever.

The United States concedes that the "colorable showing" standard applied by the court of appeals (and used by all other circuits but one) is appropriate for discovery on selective prosecution claims. It maintains, however, that the court misapplied that standard in this case by failing to require any showing that similarly situated white crack offenders had not been prosecuted.

In fact, however, the court did require a "similarly situated" showing. The United States has simply disregarded evidence of record that provides the very showing that it maintains is missing. Respondents submitted declarations

stating both that whites and blacks use and distribute crack cocaine in equal amounts, and that non-black crack offenders are prosecuted in state rather than federal court. In addition, the government's own submission further supported respondents' claim, as the government was unable to identify a single white defendant (and only 11 non-black minority defendants) over a three-year period.

The United States maintains that the court of appeals improperly presumed that blacks and whites distribute crack cocaine equally. In fact, the court of appeals simply declined to adopt the competing presumption, namely, that crack cocaine distributors are exclusively black. The court's refusal to adopt such an extreme presumption was justified, particularly in light of record evidence showing that whites and blacks distribute crack in equal numbers, and that non-black offenders are tried in state court.

The United States maintains that a higher degree of proof should be required for selective prosecution claims than for other equal protection claims, relying on McCleskey v. Kemp, 481 U.S. 279 (1987). But McCleskey, which turned on the racial composition of jury verdicts, is inapposite here. The more appropriate analogue is Batson v. Kentucky, 476 U.S. 79 (1986). That case, like this one, involved a charge of racial discrimination in the exercise of prosecutorial discretion. In Batson, this Court held that a prima facie case of discrimination could be established by a racial pattern of peremptory strikes, shifting the burden to the prosecutor to offer race-neutral explanations. Here, the court of appeals held that a racially exclusive pattern of prosecutions, together with evidence that other races commit the crimes charged but are prosecuted in state court, constituted a "colorable showing" justifying limited discovery. If a racial pattern of peremptory strikes can amount to a prima facie case, surely a racial pattern of prosecutions can

support a colorable showing justifying limited discovery.

Finally, affirming the court of appeals here will not subject prosecutors and courts to a floodgate of selective prosecution claims. The United States's suggestion to the contrary is predicated on its own disregard of the full extent of the record in this case, and not on any legal infirmity in the court of appeals' analysis. The "colorable basis" discovery threshold has governed selective prosecution cases in the majority of the circuits for many years, and very few defendants have ever satisfied that standard. There is no need to increase what has historically proven to be an almost insuperable obstacle. To do so would only undermine the cause of law enforcement, by increasing distrust and skepticism about equal protection of the criminal laws.

ARGUMENT

I. EFFECTIVE CRIMINAL LAW ENFORCEMENT REQUIRES BOTH THE REALITY AND APPEARANCE OF FAIRNESS

Petitioners' brief stresses the importance of prosecutorial discretion to the enforcement of the criminal law. Pet. Br. 16-17. But effective enforcement of the criminal law also requires that this discretion be exercised without invidious discrimination. The legitimacy of the criminal law turns on the promise that all are equal before the law.

A. Effective Criminal Law Enforcement Requires the Cooperation of the Community

Without the community's cooperation, criminal law enforcement is impossible. Police officers and prosecutors

rely on members of the community to provide information for the prevention and detection of crime. Prosecutors rely on citizens to testify as witnesses. And prosecutors and courts rely on members of the community to serve as jurors and apply the law to their peers. Where the community views the criminal law as just, cooperation can be assumed. But where the law is viewed as unjust, enforcement is compromised. Police find it more difficult to get leads, prosecutors find potential witnesses more reluctant to testify, and jurors may engage in nullification.

The community's acceptance of the criminal justice system's fairness is also important at a deeper level. The vast majority of our citizens obey the criminal law. They do so, however, not because they fear imprisonment, but because their personal and peer group values are consonant with the criminal law. The likelihood of being apprehended and punished for most crimes is very small. For example, the odds of going to prison for assault, burglary, larceny, or motor-vehicle theft are one-hundred-to-one.³ "Victimless" crimes like drug possession and distribution are even more unlikely to lead to incarceration. As a result, social scientists have determined that the deterrent effects of incarceration are not likely to play a significant role in a citizen's decision to obey or to violate the law.⁴

The most significant determinant in whether an individual obeys the law is the extent to which the individual and his or her peer group internalize the mores reflected in the criminal law. Social psychologist Tom Tyler has found

³ Paul H. Robinson, Fundamentals of Criminal Law 18-19 (2d ed. 1995).

⁴ See Paul H. Robinson, Moral Credibility and Crime, Atlantic Monthly, March 1993, at 72, 74.

that personal morality and belief in the legitimacy of the criminal justice system are the most important contributors to compliance with the law.⁵ Sociologists Robert Meier and Weldon Johnson found that the fear of disapproval by one's peer group is more important than formal legal sanctions in explaining why people obey the law.⁶ And Harold Grasmick and Donald Green concluded in a 1980 study that the threat of legal sanctions, social disapproval of one's peer group, and personal morality each make significant, independent contributions to the decision to avoid criminal behavior.⁷

Where the criminal law is viewed as fair, it is more likely to reinforce personal morality, and violations of the law are more likely to bring social disapproval. Where, by contrast, the criminal law is viewed as unfair, personal and peer group values are more likely to diverge from the criminal law. As the Second Circuit has noted, "[n]othing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations such as race ... as the basis for determining its applicability." United States v. Berrios, 501 F.2d 1207, 1209 (2d Cir. 1974); see also Tyler, Why People Obey the Law, *supra* at 161-63.

For both of these reasons -- the importance of community cooperation and the role played by personal and

⁵ Tom Tyler, Why People Obey the Law 161-78 (1990).

⁶ Robert Meier and Weldon Johnson, Deterrence as social control: The legal and extralegal production of conformity, 42 Am. Socio. Rev. 292 (1977).

⁷ Harold G. Grasmick & Donald E. Green, Legal punishment, social disapproval and internalization as inhibitors of illegal behavior, 71 J. Crim. L. & Criminol. 325 (1980).

peer group values -- effective law enforcement demands first and foremost that the criminal justice system apply equally to all. "To perform its high function in the best way 'justice must satisfy the appearance of justice.'" In re Murchison, 349 U.S. 133, 136 (1955).

B. The Perception of Race Discrimination in the Administration of Criminal Law Undermines the Effectiveness of Criminal Law Enforcement

The reality and perception of race discrimination in criminal law are a significant obstacle to its enforcement. The criminal justice system has historically been plagued by discriminatory practices, and contemporary news accounts regularly carry accounts of modern-day discrimination. As a result, polls consistently show that black citizens have far less faith than whites in the criminal justice system. And this fact in turn makes it more difficult to provide the black community with equal protection of the laws.

Race discrimination has a long and unfortunate history in the American administration of criminal justice. In 1880, this Court announced that racial discrimination in selecting jury venires violated the Equal Protection Clause, Strauder v. West Virginia, 100 U.S. 303 (1880), yet until 1935, the Court regularly affirmed convictions of black defendants by all-white juries in districts and counties where few or no blacks had ever served on a criminal jury.⁸ Until 1986, prosecutors were free to use peremptory strikes to

⁸ Benno C. Schmidt, Jr., Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia, 61 Tex. L. Rev. 1401 (1983).

exclude black jurors simply because they were black,⁹ and through that mechanism black jurors were regularly barred from serving on petit juries.¹⁰

The criminal justice system is plagued by widespread racial disparities. While African-Americans make up 12 percent of the population, they fill about half of our nation's prison and jail cells. In 1995, one in three young black men between the ages of 20 and 29 was imprisoned or on parole or probation.¹¹ The per capita incarceration rate among blacks is seven times that among whites.¹²

The disparities are most severe in the area of drug law enforcement, the subject matter of this case. In 1992 and 1993, African-Americans constituted 13 percent of drug users, 35 percent of those arrested for drugs, 55 percent of drug convictions, and 74 percent of those serving sentences

⁹ See Swain v. Alabama, 380 U.S. 202 (1965).

¹⁰ In Dallas County, Texas, for example, prosecutors in 100 criminal trials in 1983 and 1984 used 405 of 467 eligible black jurors, and struck five times as many black as white jurors. Steve McGonigle & Ted Timms, Prosecutors Routinely Bar Blacks, Study Finds, Dallas Morning News, Mar. 9, 1986, at A1. Over a seven-year period, one Georgia prosecutor used 94 percent of his peremptory strikes against black jurors where the defendant was black and the victim white. Horton v. Zant, 941 F.2d 1449, 1458 (11th Cir. 1991).

¹¹ Marc Mauer and Tracy Huling, The Sentencing Project, Young Black Americans and the Criminal Justice System: Five Years Later, Oct. 1995, at 1.

¹² Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America 4 (1995).

for drugs.¹³ From 1986 to 1990, the percentage of black defendants convicted in federal court for drug trafficking more than doubled, from 19 percent in 1986 to 46 percent in 1990.¹⁴ By contrast, the percentage of white defendants convicted in federal court for drug trafficking increased only by about one-third, from 26 percent in 1986 to 35 percent in 1990.¹⁵

Between 1986 and 1991, arrests of minorities increased twice as much as arrests of whites.¹⁶ Yet when that overall figure is broken down by type of crime, drug offenses were the only area in which minority arrests increased more than nonminority arrests. The five-year increase in minority drug arrests was almost ten times the increase in arrests of white drug offenders.¹⁷

Figures like these have led many to question the fairness of the criminal justice system.¹⁸ Polls routinely demonstrate that blacks distrust the criminal justice system in far higher proportions than whites. A 1993 Gallup poll found that 74 percent of blacks believe that blacks are

¹³ Mauer and Huling, Young Black Americans and the Criminal Justice System: Five Years Later, *supra* at 12.

¹⁴ Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics -- 1992, at 623 tbl 6.70 (Kathleen Maguire et al. eds. 1993).

¹⁵ *Id.*

¹⁶ American Bar Association's Section of Criminal Justice, The State of Criminal Justice: An Annual Report 9 (1993).

¹⁷ *Id.*

¹⁸ See, e.g., Tonry, Malign Neglect, *supra* at 49-80, 104-115.

treated more harshly than whites by the criminal justice system.¹⁹ A National Law Journal study of 800 jurors found that where a police officer's and a criminal defendant's statements conflict, 42 percent of whites but only 25 percent of blacks believe the police officer's version should be credited.²⁰ Most recently, the starkly different responses of most black and white citizens to the acquittal in California v. O.J. Simpson brought home the depth of the division in black and white perceptions of crime and criminal justice.²¹ As this Court has acknowledged, "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." Rose v. Mitchell, 443 U.S. 545, 555 (1979). Yet the vast majority of black citizens believe that the criminal justice system is discriminatory. And the black community's distrust and

¹⁹ George Gallup, Jr., The Gallup Poll Monthly, No. 339 (Dec. 1994), reported in Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics -- 1993, at 171 (1993); see also Ruth Marcus, Racial Bias Widely Seen in Criminal Justice System, Research Often Supports Black Perceptions, Wash. Post, May 12, 1992, at A4 (reporting that 89% of blacks and 43% of whites think blacks do not receive equal treatment in the criminal justice system); Black and White: A Newsweek Poll, Newsweek, Mar. 7, 1988, at 23 (reporting that 66% of blacks believe the criminal justice system treats black defendants more harshly than white defendants); Jon M. Van Dyke, Jury Selection Procedure: Our Uncertain Commitment to Representative Panels 32 (1977) ("Discrimination bred by prejudice has contributed to a widespread mistrust by black people of most of the institutions of power, and most particularly the agencies of law enforcement").

²⁰ Racial Divide Affects Black, White Panelists, Nat'l L.J., Feb. 22, 1993, at 58-59.

²¹ Bill Minutaglio, Simpson Case Shows Races' Differing Views on Justice: Experience has Taught Blacks to Mistrust the System, Dallas Morn. News, Aug. 6, 1994, at 1A.

suspicion "is one of the most corrosive and consequential features of crime in this society."²²

C. Prosecutorial Discretion Feeds the Perception of Discrimination

The mistrust of the black community is fueled at least in part by unexplained discretionary decisions. Where there is room for discretion, there is room for discrimination, because "the power to be lenient [also] is the power to discriminate." McCleskey v. Kemp, 481 U.S. 279, 312 (1987) (quoting K. Davis, Discretionary Justice 170 (1973)). Prosecutorial discretion is a critically important element of the administration of criminal law, but it poses two dangers: (1) if unchecked, it may be used for discriminatory purposes; and (2) if unexplained in the face of racial disparities, it will contribute to the perception of unfairness in the criminal justice system.

As Thurman Arnold noted many years ago, "[t]he idea that a prosecuting attorney should be permitted to use his discretion ... [will appear] to the ordinary citizen to border on anarchy."²³ Similarly, Justice Harlan noted that the existence of unchecked prosecutorial discretion undermines "the appearance of evenhanded justice." Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971) (Harlan, J., concurring). Justice Jackson pointed specifically to the danger that prosecutorial discretion may be used discriminatorily:

²² John Hagan & Ruth D. Peterson, "Criminal Inequality in America," in Hagan & Peterson, eds., Crime and Inequality 15, 17 (1995).

²³ Thurman Arnold, Law Enforcement: An Attempt at Social Dissection, 42 Yale L.J. 1, 7 (1932).

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous ... It is in this realm -- in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecution power lies.²⁴

All of these concerns are presented where, as here, a claim of racially selective prosecution has been supported by evidence of a stark racial disparity. To allow such evidence to go unanswered, as petitioner asks, would add to the appearance of racial discrimination in criminal justice, and in drug enforcement in particular. That perception would in turn contribute to the black community's distrust of criminal justice, and undermine the effectiveness of law enforcement.

II. THE "COLORABLE SHOWING" STANDARD ADEQUATELY SAFEGUARDS PROSECUTORIAL DISCRETION

The mere perception of racial discrimination, of course, cannot support discovery in a criminal case. Nor is a mere statistical disparity generally enough, unless it is especially extreme. On the other hand, defendants should not be required to prove their case in full in order to obtain discovery. A balance must be struck. Amici believe that the Ninth Circuit, like the majority of Circuits, struck the proper balance by allowing limited discovery upon a "colorable

²⁴ Robert Jackson, The Federal Prosecutor, 24 J. Am. Judicature Soc'y 18, 18 (1940).

showing" of selective prosecution.

Amici fully appreciate the importance of prosecutorial discretion. Without it, criminal justice administration would be impossible. Limited resources mean that all law violators cannot be prosecuted. The need to encourage participation in the investigation and prosecution of crime often requires prosecutors to exercise their discretion to be lenient in exchange for assistance from a defendant. And plea bargaining, without which the criminal justice system would soon be overwhelmed, requires prosecutorial discretion.

Moreover, there are good reasons for insulating ordinary prosecutorial decisions from judicial review. Prosecutorial discretion in the enforcement of the criminal law is a core executive function. Heckler v. Chaney, 470 U.S. 821, 832 (1985). The decision to prosecute "is particularly ill suited to judicial review." Wayte v. United States, 470 U.S. 598, 607 (1985). If prosecutor's decisions to charge were routinely subject to judicial review, defendants might be tempted to use that opportunity for delay. United States v. Falk, 479 F.2d 616, 637-38 (7th Cir. 1973) (en banc) (Pell, J., dissenting). And frequent judicial review of charging decisions might undermine deterrence by revealing the government's enforcement policies. Wayte, 470 U.S. at 607.²⁵ As a result, in the vast majority of cases there is no judicial review of the prosecutor's decision to charge. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

But like any discretion, prosecutorial discretion is subject to abuse. And without judicial review, this power

²⁵ See also James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1549-50 (1981).

may be used to violate fundamental constitutional rights. "Few officials can so affect the lives of others as can prosecutors."²⁶ Accordingly, the Court has adjudicated challenges to prosecutorial decisions where constitutional rights are at stake, including selective prosecution, Wayte v. United States, 470 U.S. 598, the disclosure of exculpatory information, Brady v. Maryland, 373 U.S. 83 (1963), and the use of peremptory challenges. Batson v. Kentucky, 476 U.S. 79. Indeed, one of the Court's earliest equal protection decisions involved a successful claim of selective prosecution. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

There is no dispute in this case that the courts ought to review prosecutorial decisionmaking where there is evidence of selective enforcement. Nor is there any dispute about the appropriate showing required to authorize discovery into prosecutorial practices and intent: the United States agrees with the Ninth Circuit and every other Circuit but one that discovery should be permitted where defendants have made a "colorable showing" of impermissible discrimination. Pet. Br. 22-23 (citing with approval United States v. Cooks, 52 F.3d 101 (5th Cir. 1995), and Attorney General v. Irish People, 684 F.2d 928 (1982), cert. denied, 419 U.S. 1172 (1983), both of which applied a "colorable showing" standard).²⁷

²⁶ Steven A. Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U.Pa. L.Rev. 1365, 1365 (1987).

²⁷ Every circuit but the Eighth has applied a colorable basis showing or lower at the discovery threshold. See, e.g., United States v. Penagarciano-Soler, 911 F.2d 833, 838 (1st Cir. 1990) (defendant must allege sufficient facts tending to show disparate treatment and raising a reasonable doubt about intent); United States v. Fares, 978 F.2d 52, 59 (2d Cir. 1992) (some evidence tending to show both elements); United States v. Torquato, 602 F.2d 564, 570 (3d Cir.)

While a single Circuit has held -- apparently inadvertently -- that a "prima facie" case must be established before discovery is permitted, this standard would create an unreasonably high barrier to discrimination claims.²⁸ A prima facie case shifts the burden to the prosecution to rebut the evidence of discrimination, and indeed is sufficient to dismiss the case unless the prosecution successfully rebuts it. To impose such a standard at the discovery threshold would effectively require defendants to prove their cases without discovery. And because the evidence necessary to establish selective prosecution -- prosecutorial practice and prosecutorial intent -- will virtually always be in the prosecution's control, such a standard would effectively preclude selective prosecution defenses in all cases other than open admissions of impermissible motive by the

(colorable showing), cert. denied, 444 U.S. 941 (1979); United States v. Greenwood, 796 F.2d 49, 52 (4th Cir. 1986) (nonfrivolous showing); United States v. Peete, 919 F.2d 1168, 1176 (6th Cir. 1990) (colorable showing); United States v. Goulding, 26 F.3d 656, 662 (7th Cir.) (colorable basis), cert. denied, 115 S. Ct. 673 (1994); United States v. P.H.E., Inc., 965 F.2d 848, 860 (10th Cir. 1992) (colorable showing); Jones v. White, 992 F.2d 1548, 1572 (11th Cir. 1993) (facts sufficient to raise a reasonable doubt about the prosecutor's motives), cert. denied, 114 S. Ct. 727 (1994).

²⁸ Only the Eighth Circuit requires defendants to prove a prima facie case to obtain discovery, and that appears to be the result of a mistaken application of its own precedent. In United States v. Parham, 16 F.3d 844, 846 (8th Cir. 1993), the court sets forth the prima facie standard, but in doing so merely cites to United States v. Hintzman, 806 F.2d 840, 846 (8th Cir. 1986). Hintzman, however, in turn merely cites United States v. Catlett, 584 F.2d 864, 866 (8th Cir. 1978), which states that only a "colorable basis" is required for discovery. See also United States v. Jacob, 781 F.2d 643, 646 (8th Cir. 1986) (applying "colorable basis" standard); United States v. Cammisano, 546 F.2d 238, 241 (8th Cir. 1976) (applying colorable basis standard).

prosecutor.

The "colorable showing" standard has not proven burdensome to prosecutors. If anything, it has proven burdensome to defendants. No race-based discrimination selective prosecution claim has succeeded in a reported federal case since 1886. Yick Wo v. Hopkins, 118 U.S. 356. Among reported federal cases, only a handful of cases over more than a century have ever made it to the discovery threshold.²⁹ Even among state decisions, amici were able to locate only a single case in which a race-based selective prosecution claim resulted in dismissal.³⁰

This paucity of successful race-based selective prosecution claims, when compared with the record of race discrimination in virtually every other public and private institution, (from employment to education to housing to juries), indicates that the standards currently in place are if anything too stringent. There is certainly no evidence that prosecutors -- along among all official actors -- are immune from racial prejudice.³¹ Amici therefore urge the Court not

²⁹ See, e.g., American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045 (9th Cir. 1995); United States v. Adams, 870 F.2d 1140 (6th Cir. 1989); United States v. Gordon, 817 F.2d 1538 (11th Cir. 1987), vacated in part on rehearing on other grounds, 836 F.2d 1312 (11th Cir.), cert. dismissed, 487 U.S. 1265 (1988).

³⁰ People v. Ochoa, 165 Cal. App. 3d 885, 212 Cal. Rptr. 4 (1985). This was the only successful dismissal found in a LEXIS search of all state cases using the key words "selective prosecution" and "race."

³¹ Several studies have concluded that racial considerations have affected prosecutorial charging decisions. Of most relevance here, Richard Berk & Alec Campbell studied all arrests for cocaine base in Los Angeles County between January 1, 1990 and October 10,

to depart from the "colorable showing" standard.

III. THE COURT OF APPEALS CORRECTLY APPLIED THE "COLORABLE SHOWING" STANDARD IN THIS CASE

The United States's principal contention is that the court of appeals incorrectly applied the "colorable showing" test by failing to require defendants to demonstrate that similarly situated non-black crack offenders had not been prosecuted in federal court. Pet. Br. 11. It maintains that in excusing this requirement, the court of appeals adopted an impermissible presumption that people of all races commit all types of crimes. Pet. Br. 28. Finally, it argues that claims of selective prosecution should be subjected to higher standards of proof than other equal protection claims. None of these arguments withstands scrutiny.

1992, and found that while blacks made up 58% of those arrested, the U.S. Attorney did not prosecute a single white offender during that period). Richard Berk & Alec Campbell, Preliminary Data on Race and Crack Charging Practices in Los Angeles, 6 Fed. Sent. R. 36 (1993); see also Developments in the Law -- Race and The Criminal Process, 101 Harv. L. Rev. 1520, 1525-1530 (1988) (summarizing studies); Cassia Spohn, John Gruhl & Susan Welch, The Impact of Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges, 25 Criminology 175 (1987) (finding that in similarly situated cases, prosecutors rejected felony charges against whites 59% of the time, but rejected felony charges against blacks only 40% of the time); Michael Radelet & Glenn L. Pierce, Race and Prosecutorial Discretion in Homicide Cases, 19 Law & Soc'y Rev. 587 (1985) (examining over 1000 homicide cases in Florida, and finding that victim's and defendant's race had significant, independent impacts on prosecutor's initial assessment regarding severity of offense).

A. The District Court Had Sufficient Evidence Before it That Similarly Situated Non-Black Crack Cocaine Offenders Were Not Prosecuted in Federal Court

The United States's principal contention -- that the court of appeals erred by excusing any showing that similarly situated others were not prosecuted -- is wrong both as a factual and legal matter.

1. The United States Ignores the Full Record Before the District Court

As a factual matter, the United States's objection that the evidence did not meet the "colorable showing" threshold fails to grapple with the full record before the courts below. The United States focuses almost exclusively on the study showing that 24 of 24 closed cases in 1991 involved black defendants. But that was not the only evidence considered by the district court or the court of appeals. In addition to that evidence, the courts had before them a declaration from an attorney experienced in the state criminal justice system specifically stating that in his experience non-black crack offenders were prosecuted in state court, and another declaration recounting a halfway house intake coordinator's statement that in his experience treating crack cocaine addicts, whites and blacks use and distribute crack in equal numbers. These declarations provide exactly the information the United States complains was missing. Yet apart from two footnote references, the United States's brief virtually ignores these declarations.

The United States gives three reasons for disregarding this evidence, none of them persuasive. First, it states that the district court did not rely on the declarations. Pet. Br. 28. But the language the government

quotes gives no indication that the district court declined to consider this evidence, which was submitted in connection with adjudicating the United States's motion to reconsider. Moreover, the court of appeals expressly based its decision on all the evidence before the district court, not merely the statistical study. Pet. 26a (upholding district court decision "when all of the evidence is taken together"); Pet. App. 30a (Wallace, J., concurring) (specifically relying on declarations).

Second, the United States claims that the declarations should be dismissed as "vague, conclusory, and impressionistic hearsay." Pet. Br. 35 n.4. But as the court of appeals noted, the United States never objected to the declarations' admission below, and therefore may not raise such evidentiary objections now. Pet. App. 23a n.8. Particularly when considered together with the rest of the evidence, the declarations provide far more than vague or conclusory evidence. They paint a cohesive and disturbing picture, in which a world of white and black crack cocaine users and distributors yielded an exclusively black group of federal defendants, while non-black defendants were prosecuted in state court.³²

Third, the United States argues that the declarations

³² United States Dep't of Labor v. Triplett, 494 U.S. 715, 724 (1990), relied upon by the United States, Pet. Br. 35 n.4, could not be more different. In that case, the declarations at issue claimed generally that black lung attorneys' fees compensation was so inadequate that lawyers would not do the work. The declarations were wholly impressionistic, were supported by no other evidence, and were directly contradicted by a statistical study showing that 92 percent of black lung claimants were in fact represented. Here, by contrast, all of the evidence submitted points in precisely the same direction -- toward a colorable showing of discrimination.

do not establish that non-black crack offenders were precisely similarly situated to defendants here, because there was no allegation that they had conspired to distribute more than 50 grams of cocaine or that the conspiracy involved firearms. Pet. Br. 35-36 n.4. But defendants in this case were also charged with routine distribution and possession with intent to distribute cocaine. With respect to those charges, the declarations do support a showing that similarly situated others were not prosecuted in federal court. And the United States put forward no evidence to support the notion that it prosecuted only defendants who distributed over 50 grams and used firearms, or that only black offenders distribute in such quantities or use firearms.

Thus, what the United States presents as a categorical claim about the necessity for a showing that similarly situated others were not prosecuted is in fact only a disagreement about the strength of the evidence defendants put forward. On that question, the district court has considerable discretion at the discovery threshold, and did not abuse that discretion here. See Pet. App. 28a-31a (Wallace, C.J., concurring).

2. The United States Concedes That Defendants Need Not Always Show That Similarly Situated Others Were Not Prosecuted to Obtain Discovery

The United States's argument that a defendant must always show that similarly situated others were not prosecuted in order to obtain discovery is also wrong as a legal matter. Indeed, the United States concedes that such a showing would not be required "in cases involving direct admissions by officials of discriminatory purpose." Pet. Br. 15.

Similarly, were a defendant to show that 200 of 200 (rather than 24 of 24) crack cocaine cases closed by the Federal Public Defender over a one-year period involved black defendants, a court would undoubtedly be justified in finding a "colorable showing" of selective prosecution. Like an admission of discriminatory purpose, such a showing would in itself make it reasonably likely that discrimination was occurring, even without identification of specific similarly situated non-black offenders who had not been prosecuted. If a sufficiently strong racial disparity can be sufficient to establish an equal protection violation, see, Gomillion v. Lightfoot, 364 U.S. 339 (1960), it certainly ought to be enough to constitute the colorable showing required for limited discovery.

Thus, properly understood, the United States's objection to the court of appeals' decision is not a categorical one that a similarly-situated showing must always be made, but simply a dispute about whether the specific quantum of evidence justified discovery here. As Judge Wallace emphasized, the question is whether the quantum of evidence here justifies the conclusion that the district court did not abuse its discretion in ordering discovery. When the proper standard is applied to the full record, the Ninth Circuit's decision is fully justified.

B. The Court of Appeals Did Not Rely on a Presumption that Blacks and Whites Distribute Crack Cocaine Equally, But Declined to Adopt a Presumption that Blacks Exclusively Distribute Crack Cocaine

The United States claims that the court of appeals dispensed with the requirement that defendants show selection by presuming that whites and blacks commit crack cocaine offenses on an equal basis. Pet. Br. 28-30. As

shown above, the court of appeals did not in fact dispense with the selection requirement, but rested its decision on evidence that whites and blacks both use and distribute crack, and that similarly situated non-black offenders were tried in state court.

Moreover, in assessing the significance of the statistical study, the court of appeals did not presume that whites and blacks commit crack offenses equally. Rather, it refused to adopt the opposite presumption -- that only blacks commit crack offenses. Pet. App. 19a (declining to adopt "the premise that any type of crime is the exclusive province of any particular racial or ethnic group"). In order to dismiss the persuasiveness of respondents' showing that every crack case closed by the Federal Public Defender over a one-year period involved black defendants, one must presume that blacks exclusively use and distribute crack cocaine. The court of appeals reasonably refused to adopt that presumption.

The court's refusal to adopt the only presumption that would adequately explain defendants' showing was fully supported by the record. The halfway house intake coordinator's statement supported the conclusion that whites and blacks do in fact use and distribute crack cocaine in roughly equal numbers. Pet. App. 6a. And as the court of appeals noted, "the government's own showing in and of itself provides evidence that similarly situated potential defendants of other races do exist -- in other words, that non-blacks also commit violations of 21 U.S.C. §§841 and 846." Pet. App. 19a. This evidence fully supports the court of appeals' refusal to presume that crack cocaine is exclusively distributed by blacks. And absent that presumption, defendants' evidence constitutes a colorable showing of selective prosecution.

C. **Batson v. Kentucky, Not McCleskey v. Kemp,**
Provides Guidance For Reviewing Race-Based
Exercises of Prosecutorial Discretion

The United States cites McCleskey v. Kemp, 481 U.S. 279 (1987), as support for the proposition that a claim of selective prosecution requires "exceptionally clear proof." Pet. Br. 18. But McCleskey was not a selective prosecution case, and this Court has never held that selective prosecution claims require any stronger showing of discrimination than ordinary equal protection claims. See Wayte v. United States, 470 U.S. at 608 (selective prosecution cases governed by ordinary equal protection standards); Wade v. United States, 504 U.S. 181, 185 (1992) (applying ordinary equal protection standards to claim that prosecutor exercised discretion to file a substantial-assistance motion for constitutionally impermissible motive). Indeed, amici are aware of no challenge to an exercise of prosecutorial discretion in which the Court has required "exceptionally clear proof."

McCleskey involved a challenge to Georgia's administration of the death penalty, based on a statistical study of death penalty convictions. In declining to infer intentional discrimination from that study, the Court emphasized that each conviction was reached by a unique 12-person jury of citizens. 481 U.S. at 294-95. The fact that each jury was different meant that one could not infer anything about a particular jury's motives from the past practices of other juries. Moreover, jury members could not be called on to testify about their motives, leaving the state no real opportunity to disprove an inference, were one drawn. Id. at 296.

Here, respondents' claim of discrimination is directed at the U.S. Attorney's office. No claim is made that juries

have participated in the discrimination; the contention is that the prosecutors themselves have selectively targeted black defendants for federal prosecution. Unlike jurors, prosecutors in the Central District are required to act pursuant to office policies, and a single U.S. Attorney is responsible for overseeing the office's policies and practices. Thus, a racial pattern of prosecutions may well create a "colorable showing" that the office is engaged in discriminatory selective prosecution.

The most appropriate analogue here is not McCleskey but Batson v. Kentucky, 476 U.S. 79 (1986). In Batson, as here, the Court addressed a claim that prosecutors were using their discretion in a racially discriminatory manner. Yet the Court in Batson did not require "exceptionally clear proof" of discrimination. On the contrary, Batson directs that courts may adopt an inference of discrimination from a prosecutor's racial pattern of strikes. 476 U.S. at 97. Such a showing does not merely justify discovery, but shifts the burden to the prosecutor to offer a race-neutral explanation for the strikes. Thus, if a defendant showed that a prosecutor used 24 of his 24 peremptory strikes to strike black jurors, the prosecutor would be required to offer race-neutral explanations for his actions, and if she was unable to do so, the court would invalidate the strikes.³³

³³ If the prosecutor responded with an affirmative showing that all of the potential jurors were black, defendants' showing would not establish discrimination, but in the absence of such a showing, the racial pattern would suffice to shift the burden to the prosecution. Similarly, here, the court of appeals held that if the prosecution could show that all crack offenders are black, defendants' evidence would not support a "colorable showing." But the United States has not made such a showing.

Because Batson involves the review of prosecutorial discretion in a setting where racial discrimination has been alleged, it is a far more appropriate analogue than McCleskey.³⁴ And if a racial pattern of strikes can create a prima facie case of discrimination in Batson, surely a racial pattern of prosecutions ought to support the less onerous threshold for the limited discovery ordered here.

IV. UPHOLDING THE DISCOVERY ORDER HERE WILL NOT OPEN THE FLOODGATES TO SELECTIVE PROSECUTION CLAIMS

In its petition, the United States intimated that allowing the Ninth Circuit decision to stand would subject prosecutors and the courts to a flood of selective prosecution claims. It pointed to nationwide statistics indicating that many crimes have disproportionate sentencing patterns, and argued that if such a showing were sufficient to justify discovery, untold numbers of criminal defendants could obtain discovery on selective prosecution claims. Like the rest of the United States's argument, this argument ignores the full record in this case.

Upholding the discovery order in this case would mean only that district courts have discretion to order discovery where: (1) defendants make a showing, particularized to the district in which they were charged, that

³⁴ There are no doubt differences between a selective prosecution claim and a peremptory strike challenge. Batson claims ordinarily arise in a single case, while selective prosecution claims necessarily require a comparison with other cases. But Batson claims may also be supported by evidence of prosecutorial conduct beyond the immediate case, Ex parte Branch, 526 So. 2d 609 (Ala. 1987), and may be made even where more than one prosecutor takes part in striking jurors. Bird v. Warner, 594 So. 2d 626 (Ala. 1991).

all cases closed by the Federal Public Defender's office over a one-year period involved defendants of one race; (2) defendants offer evidence that white and black persons commit the crimes for which they are charged in equal numbers; (3) defendants offer evidence that similarly situated non-black offenders are steered to state court, where sentences are lighter; and (4) the government's evidence reinforces, rather than contradicts, defendants' showing.

The evidence in this case, in other words, is a far cry from the submission of gross national statistics about convictions. United States v. Cooks, 52 F.3d 101 (5th Cir. 1995), whose approach the United States endorses, illustrates that concerns of a slippery slope are not warranted here. In that case, as here, the court applied the "colorable showing" standard that the United States concedes is appropriate as a discovery threshold. But in that case, black defendants charged with crack cocaine violations offered no evidence particularized to their district, nor any evidence about similarly situated white offenders. 52 F.3d at 105. Defendants submitted only national statistics showing that minority arrests had increased tenfold in recent years, and that the overwhelming majority of those arrested for crack possession were African-Americans. Id. The court properly considered such generalized proof insufficient to raise a colorable showing that the U.S. Attorney in Shreveport, Louisiana was engaged in selective prosecution.

There is no evidence that the "colorable showing" discovery standard employed by the court of appeals will lead to a floodgate of claims. This is the standard used by every circuit but one, yet discovery on selective prosecution claims has proven exceedingly rare. Because the Ninth Circuit simply applied this well-established standard to determine that the district court did not abuse its discretion,

there is no likelihood that its decision will lead to a rash of unjustified selective prosecution claims.

CONCLUSION

Amici, former law enforcement officials, understand the importance of prosecutorial discretion, but also understand the equal importance of assuring the public that the criminal law is enforced fairly and equitably, without discrimination based on race. Reversing the court of appeals will contribute to a sense that significant racial inequities are being ignored by the legal system, and will undermine the legitimacy of the criminal law. For all of these reasons, the court of appeals' decision should be affirmed.

Respectfully submitted,

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JAN 16 1996

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

—vs—

CHRISTOPHER LEE ARMSTRONG, *et al.*,*Respondents.*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**BRIEF OF NAACP
LEGAL DEFENSE & EDUCATIONAL FUND, INC.,
AND AMERICAN CIVIL LIBERTIES UNION AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. CONTEMPORARY EVIDENCE REVEALS THAT RACIAL BIAS CONTINUES TO INFLUENCE THE EXERCISE OF DISCRETIONARY ACTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE	4
A. Comprehensive studies initiated by state and federal courts show that racial bias continues to influence decision-making in the criminal justice system	4
1. Race continues to influence discretionary decisionmaking within the criminal justice system	5
2. Racism, both overt and unconscious, affects discretionary charging and sentencing	7
B. Eliminating racial bias, both overt and unconscious, from judicial proceedings requires that courts take specific steps to identify instances in which bias may influence decision-making and to prevent it from doing so	10
1. Despite the courts' current efforts to eradicate racial bias, overt and unconscious racism on the part of law enforcement actors persists	10
2. Adequate information must be collected, maintained and disclosed when necessary in order to determine the existence or non- occurrence of bias-influenced decisionmaking	13

3.	Based upon the availability of such reliable information, the exercise of discretion can be monitored so as to identify and eliminate discriminatory actions in the criminal justice process	14
II.	THE DISCRETIONARY DECISIONS OF FEDERAL PROSECUTORS WHETHER TO EXERT FEDERAL CRIMINAL JURISDICTION OVER NARCOTICS OFFENSES MUST BE SUBJECT TO EFFECTIVE MONITORING TO ENSURE THAT RACIAL BIAS DOES NOT INFLUENCE THEM	16
III.	THE GOVERNMENT'S VIEW THAT DISCOVERY IS NOT PERMISSIBLE UNTIL THE DEFENDANT MAKES A SUBSTANTIAL THRESHOLD SHOWING OF SELECTIVE PROSECUTION, IF ACCEPTED, WOULD IMPOSE AN UNNECESSARY AND CRIPPLING BURDEN UPON VINDICATION OF EQUAL PROTECTION CLAIMS	19
A.	The "substantial threshold" rule overprotects the government's interest in preserving broad discretionary prosecution powers.	19
B.	Such a rule is based upon a false premise: that the evidence supporting such a claim is generally and reasonably available	21
C.	The "substantial threshold" standard would impose a crippling burden of production	23

IV.	THE DISTRICT COURT'S DISCOVERY ORDER APPROPRIATELY BALANCED EACH PARTY'S LEGITIMATE INTERESTS	25
	CONCLUSION	29
	APPENDIX A	

TABLE OF AUTHORITIES

<i>Cases:</i>	<i>Pages:</i>
Alexander v. Louisiana, 405 U.S. 625 (1972)	2
Batson v. Kentucky, 476 U.S. 79 (1986)	<i>passim</i>
Carter v. Jury Commission, 396 U.S. 320 (1970)	2
Coker v. Georgia, 433 U.S. 584 (1977)	2
Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991)	12
Furman v. Georgia, 408 U.S. 238 (1972)	2
Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991)	25
Jones v. Davis, 835 F.2d 835 (11th Cir. 1988)	25
Love v. Jones, 923 F.2d 816 (11th Cir. 1991)	25
McCleskey v. Kemp, 481 U.S. 279 (1987)	2
Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995)	25
Powell v. Alabama, 287 U.S. 45 (1932)	2

Strauder v. West Virginia, 100 U.S. 303 (1880)	12
Swain v. Alabama, 380 U.S. 202 (1965)	2, 23, 24
Turner v. Fouche, 396 U.S. 346 (1970)	2
United States v. Armstrong, 48 F.3d 1508 (9th Cir. 1995)(en banc)	28
United States v. Clary, 846 F. Supp. 768 (E.D. Mo. 1994)	18
United States v. Hazel, 696 F.2d 473 (6th Cir. 1983)	22
United States v. Hoover, 727 F.2d 387 (5th Cir. 1984)	22
<i>Miscellaneous:</i>	<i>Pages:</i>
Bennett L. Gershman, Prosecutorial Misconduct (1993) ..	20, 21
California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts, 1991-1992 Public Hearings (1993)	9
D.C. Circuit Task Force on Gender, Race and Ethnic Bias, <u>Draft Final Report</u> , Jan. 1995	<i>passim</i>
Florida Supreme Court Racial and Ethnic Bias Study Commission, Where the Injured Fly for Justice, Dec. 11, 1990	<i>passim</i>
Florida Supreme Court Racial and Ethnic Bias Study Commission, Where the Injured Fly for Justice, Dec. 11, 1991	5, 13, 15

Georgia Supreme Court Commission on Racial and Ethnic Bias in the Court System, Let Justice Be Done: Equally, Fairly, and Impartially, Aug. 1995	5, 12, 14, 15
James Vorenberg, Decent Restraint of Prosecutorial Discretion, 94 Harv. L. Rev. 1521 (1981)	20
Massachusetts Supreme Judicial Court Commission to Study Racial and Ethnic Bias in the Courts, Final Report, Sept. 1994	<i>passim</i>
Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America, 1995	16
Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts, Final Report, Dec. 1989	<i>passim</i>
New Jersey Supreme Court Task Force on Minority Concerns, Final Report, June 1992	5, 12, 14
New York State Judicial Commission on Minorities, Executive Summary, April 1991	<i>passim</i>
Oregon Supreme Court Task Force, Report on Racial/Ethnic Issues in the Judicial System, May 1994	<i>passim</i>
Richard Berk, Preliminary Data on Race and Crack Charging Practices in Los Angeles, 6 Fed. Sentencing Rep. 36 (1993)	17
Robert Jackson, The Federal Prosecutor, 31 J.Crim.L. & Crim. 3	20
Sam Meddis, Whites, Not Blacks, At The Core of Drug Crisis, USA Today, Dec. 20, 1989	17, 18

Pages

State of Iowa Equality in the Courts Task Force, Final Report, Feb. 1993	7, 13, 14, 15
The Washington State Minority and Justice Commission, Racial and Ethnic Disparities in the Prosecution of Felony Cases in King County-Final Report, Nov. 1995	5, 7, 8

No. 95-157

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER,

v.

CHRISTOPHER LEE ARMSTRONG, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF OF NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC., AND
AMERICAN CIVIL LIBERTIES UNION AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

INTEREST OF AMICI¹

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist African Americans to secure their rights by the prosecution of lawsuits. Its purpose includes rendering legal aid without cost to African Americans suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own. For many years, its attorneys have

¹Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of the Court.

APPENDIX

APPENDIX A

The state and federal court task forces were charged with determining whether racial and ethnic bias still affects the administration of justice. It is impossible to capture the thoroughness of the research conducted by each task force and the breadth of their findings and recommendations. However, to lend some context in which to understand the task force reports, below is a brief description of the methodology employed by each state and federal court task force on race and ethnic bias in the courts and excerpts from each study's findings and recommendations. In addition, where the information was available, a brief history of the task force's creation is included.

COMMITTEE ON RACE AND ETHNICITY TO THE D.C. CIRCUIT TASK FORCE ON GENDER, RACE AND ETHNIC BIAS, DRAFT FINAL REPORT, JAN. 1995

The Task Force was created in 1990 by the D.C. Circuit Judicial Council. The Task Force was created because, while efforts to explore race and ethnicity were underway at the state and local levels, there was growing recognition that these issues merited attention within the federal judicial system as well.

The Task Force interviewed judges on the Circuit to obtain their experiences and observations relating to gender, race, and ethnicity. It interviewed 80% of the trial judges, and 3 appellate judges of the Circuit. Judicial interviews were both anonymous and voluntary. Two appellate judges submitted written comments. The task force also conducted focus groups with practicing attorneys, community representatives, and courthouse personnel.

RECOMMENDATIONS

The Federal Judicial Center, or another appropriate body, should study the results of litigation (such as employment

discrimination cases) that involve issues of race, ethnicity, or gender and that affect a significant number of racial and ethnic minorities, through research controlling for the gender, race or ethnicity of the parties and attorneys in such cases.

FLORIDA SUPREME COURT RACIAL AND ETHNIC BIAS STUDY COMMISSION, WHERE THE INJURED FLY FOR JUSTICE: REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA, DEC. 11, 1990

The Commission was created on December 11, 1989 by the Chief Justice. It was charged with assessing whether race affected the dispensation of justice and with developing longterm strategies to eradicate any vestiges of discrimination.

The Commission developed the findings and recommendations contained in its report after analyzing information from several different sources. First, the Commission held public hearings in every region of the state. Second, the Commission retained leading researchers from Florida's universities and nationally recognized experts to conduct studies and to assist it in formulating the findings and recommendations contained in the report.

FINDINGS:

Extensive evidence suggests that minorities are too often subjected to the threat of abuse and brutality by law enforcement organizations. Survey responses suggest that African-Americans and Hispanic individuals are stopped and detained more frequently than a non-minority would be under similar circumstances and are treated with less respect and more unnecessary force than are their white counterparts.

Minority juveniles are being treated more harshly than non-minority juveniles at almost all stages of the juvenile justice system, including: arrest; referral for formal processing; transfer to the adult criminal justice system; secure detention prior to adjudication; and commitment to traditional state-run facilities.

Opportunities for informal processing and diversion are not equally accessible to minority juveniles. The deeper the penetration of the juvenile justice system towards "deep-end" commitment, the greater the overrepresentation of minority juveniles.

The differential treatment of minority juveniles results, at least in part, from racial and ethnic bias on the part of enough individual police officers, intake workers, prosecutors, and judges, to make the system operate as if it intended to discriminate against minorities. It results as well from bias in institutional policies, structures, and practices.

RECOMMENDATIONS:

Police practices, including field adjustments, relating to law enforcement interaction with juveniles should be recorded for supervisory review and monitoring to determine whether and how race or ethnicity has entered into arrest and disposition decisions by Florida's law enforcement personnel.

The State should mandate the establishment of procedures, in each of the agencies comprising the juvenile justice system, to encourage and provide means for reporting, investigating, and responding to professionals whose decisions appear to have been influenced by racial or ethnic bias.

FLORIDA SUPREME COURT RACIAL AND ETHNIC BIAS STUDY COMMISSION, WHERE THE INJURED FLY FOR JUSTICE: REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA, DEC. 11, 1991

The Legislature, through the joint efforts of the criminal justice and corrections committees of the House and Senate,...should immediately undertake a review of those cases prosecuted under both mandatory minimum statutes and the "habitual offender" statute to determine the effect of race or ethnicity in their selection, processing, or ultimate disposition. To the extent that improper considerations are playing a role, the Legislature should repeal these statutes altogether.

The Florida Legislature should require, as a condition of funding, that each State Attorney: a) promulgate effective criteria which ensure the fair and equal exposure of individuals to processing under mandatory minimum statutes; and b) annually submit a report to the legislative appropriations committees detailing the racial/ethnic composition of all individuals prosecuted under these statutes. To the extent that such reports reveal racial/ethnic disparities in the population of individuals who are prosecuted under these statutes, the Legislature should require a detailed justification for the impact of prosecutorial decision-making in this area.

GEORGIA SUPREME COURT COMMISSION ON RACIAL AND ETHNIC BIAS IN THE COURT SYSTEM, LET JUSTICE BE DONE: EQUALLY, FAIRLY, AND IMPARTIALLY, AUG. 1995

The Commission was created by the Georgia Supreme Court on February 1, 1993. The Commission held six public hearings throughout the state. In addition, the Commission conducted an attitude survey in order to assess

the perceptions of judges, clerks and attorneys practicing in Georgia courts. All judges of the superior, state, juvenile, and probate courts, chief magistrates, and clerks of the superior court were sent surveys in the Fall of 1994. Fifty to sixty percent of each group returned completed questionnaires. The attorney attitude survey was sent to a sample of 2,000 attorneys. Thirty-one percent of the attorneys surveyed responded.

RECOMMENDATIONS

Each circuit should be directed to develop and implement (pending the approval of the Supreme Court) a formal pre-trial release policy, specifying factors used in determining eligibility for bail.

The State has the ability to undertake additional objective testing of the perception of bias in mandatory sentencing. First, a complete and thorough study of the application of [the mandatory sentencing statute] should be conducted, breaking down data for each circuit. In order to achieve this, information of the criminal record of the defendant, the type of representation (private, public defender, or appointed indigent defense), the type of disposition (plea or trial), and the quantity of drugs should be developed, obtained and incorporated into the relevant databases.

The Implementation Committee with the assistance of such agencies as the Georgia Statistical Analysis Bureau (under the auspices of the Criminal Justice Coordinating Council) and the Prosecuting Attorneys' Council, should see that these studies are conducted. Periodic analyses and assessments of other mandatory sentences should be conducted so as to detect potential racial disparity. If such studies do indicate racial bias in the court system, the Implementation Committee should pursue steps to rectify any problems.

[T]he Prosecuting Attorney's Council [should] develop explicit, race-neutral guidelines for use in [mandatory minimum] cases by district attorneys to safeguard against bias.

The Commission feels that the legislature and the courts should consider four alternative recommendations as possible means of addressing this issue [of peremptory challenges]:

Peremptory strikes could be eliminated in civil and criminal cases.

De novo appellate review of trial court decisions on *Batson* motions could be provided.

Trial judges could conduct voir dire using questions submitted in advance in writing by counsel.

Trial judges could be encouraged to sustain *Batson's* objections when the questioned strike was made for frivolous, "hunch-type" reasons unrelated to the case at bar.

STATE OF IOWA EQUALITY IN THE COURTS TASK FORCE, FINAL REPORT, FEB. 1993

The Supreme Court of Iowa established the Equality in the Courts Task Force on December 4, 1990. The task force held five public hearings throughout the state and received written comments from over 300 people. Additionally, the Task Force contracted the services of the research firm of Selzer Boddy, Inc. to conduct four major studies directed at judges, attorneys, court personnel, and the general public. The Task Force also designated a team of researchers to undertake a special retrospective study of criminal cases to determine the effect of race in the criminal justice process. The perceptions of the general public were elicited via a telephone survey of a cross section of 400

Iowans. Surveys were mailed to 2,114 attorneys across the state, 1600 court employees, and 351 judges. The response rate for the written surveys was high: 84% for judges, 54% for attorneys, and 43% for court employees.

FINDINGS

In each case, there are unexplained differences which are not associated with any known factor but race.

The Task Force believes the uniform use of pretrial release guidelines would decrease the arbitrary or subjective nature of pretrial release decisions.

The Task Force has discovered that information is not easily retrievable throughout the state to permit study of possible race bias in the court system The benefit derived from the uniform collection of such information from all stages of the criminal process is significant.

The State should maintain a centralized data base that includes information on defendant race, victim race,...along with the range of legal and social variables included in the present study. This would allow periodic monitoring of charging and sentencing discrepancies along racial lines.

The Task Force believes that a collections system data base needs to be established on an ongoing basis to gather the facts necessary to initiate, at any time, an examination and analysis of disparate incarceration rates among adults and juveniles. Otherwise, it will be necessary to conduct expensive and time-consuming criminal case studies; such case studies cannot be done throughout the state efficiently or on an ongoing basis.

RECOMMENDATIONS

The results of the Criminal Case Study should be discussed

at the annual judges conference. The present and future court system database should be monitored periodically, and patterns of racially associated disparities noted, publicly disseminated, and specifically brought to the attention of Districts where disparities occur.

County attorney offices should be required to keep records of the charges on initial arrest, the charges ultimately filed, the arrests they chose not to prosecute, the reasons they chose not to prosecute, and the race and gender of the alleged perpetrators.

MASSACHUSETTS SUPREME JUDICIAL COURT COMMISSION TO STUDY RACIAL AND ETHNIC BIAS IN THE COURTS, FINAL REPORT, SEPT. 1994

The Commission was created on August 2, 1990 by the Justices of the Massachusetts Supreme Judicial Court. The impetus for the Commission's creation was an incident that occurred in Suffolk Superior Court in August 1988. During a criminal session of Suffolk Superior Court, two court officers mistook Assistant Attorney General Thomas H. Brewer, an African American, for a defendant and attempted to bar him, in an inappropriate manner, from gaining access to a part of the courtroom that he was entitled to enter. The resulting publicity highlighted the issue of racial bias in Massachusetts courts. In the Spring of 1990, the Chief Justice, responding to growing public concern, met with bar association leaders to discuss the need for a study. The Commission was formed following the meeting.

The Commission held seven public hearings and focus group meetings across the state to solicit a wide range of public input. The Commission also surveyed the bench and bar members, conducted an extensive research project on the racial composition of jury pools and juries, and examined the effect of bias on sentencing. An attorneys'

survey was sent to 4,542 attorneys. A judges' survey was sent to 328 judges. The response rates were 56% and 80% respectively.

RECOMMENDATIONS

The Supreme Judicial Court should undertake, on its own or through the Massachusetts Sentencing Commission, a comprehensive study of sentencing patterns to determine whether there is any disparity related to racial/ethnic bias. A sentencing study should include a detailed analysis of the sentencing patterns of young male offenders. This analysis should be conducted on serious crimes committed by white, black/African American, Hispanic and Asian American males by comparing the rates of incarceration and sentence length across these groups.

The Trial Court should produce and distribute regular reports of sentencing patterns by race and ethnicity. The Office of the Commissioner of Probation, the Committee for Public Counsel Services, the District Attorneys' offices, the Trial Court and local police departments should develop coordinated information systems which will allow comparison of the data each has collected. The District Attorney's office for each county should be the primary agency responsible for collecting the data on case processing.

MICHIGAN SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE COURTS, FINAL REPORT, DEC. 1989

The Task Force was created on September 15, 1987 by the Michigan Supreme Court. The Task Force focused its investigations on seven major areas: judicial behavior, court treatment, court employment practices, ethics, attorney

behavior, criminal justice and jury processes. The Michigan Supreme Court Task Force was the first of its kind in the nation.

The Commission was created after the Michigan Supreme Court Citizens' Commission to Improve Michigan Courts called for the creation of task forces on gender and racial/ethnic issues in the courts in 1986. The Citizens' Commission had found that a significant and disturbing perception existed among Michigan citizens: Over one-third believed that individuals were discriminated against in the Michigan court system on the basis of their gender, race or ethnic origin.

The task force held public hearings in eight cities throughout the state. In addition, it surveyed a random sample of 900 attorneys who practiced in the courts. The response rate was 45.6%. It also conducted a survey of 574 judges with an overall response rate of 45%.

FINDINGS

That trial judges should be encouraged to implement the Batson standard on their own initiative in any jury selection process in which peremptory challenges appear to be racially motivated.

RECOMMENDATIONS

The Michigan Supreme Court should conduct a study similar to that done in the felony sentencing project of actual bail practices to investigate the question of disparity in bail practices by race, ethnicity, gender, economic class and region and to establish a process to develop recommendations in the event that disparity is statistically shown.

Current analysis of sentencing should include factors relating

to the impact of and interrelationship of:

- a. misdemeanor convictions and sentences
- b. race, ethnic background and gender of the judge
- c. race, ethnic background and gender of the victim
- d. race, ethnic background and gender of the defendant
- e. guideline departures

All judges should receive an analysis of their own sentencing practices on an annual basis.

NEW JERSEY SUPREME COURT TASK FORCE ON MINORITY CONCERNS, FINAL REPORT, JUNE 1992

The Task Force was created in September 1985. The purpose of the task force was to critically examine the concerns of minorities with their treatment in the courts and to propose solutions to identified problems. The Task Force was created after Chief Justice Robert Weientz met with representatives of the Coalition of Minorities in the Judiciary in the summer of 1983. The Coalition was an organization founded in 1980 to address issues of concern to racial minorities in the judiciary and to make recommendations to the Chief Justice, the Supreme Court, and the Administrative Director of the Courts on ways to address problems relating to minority concerns. As a result of the meeting, the Chief Justice convened a Committee on Minority Concerns for the purpose of addressing the concerns of the Coalition. After reviewing the Committee's report, in September 1985, the Task force was created.

The Task Force retained several independent research consultants to execute a wide-ranging research program. The Task Force also met with representatives of bar associations, administrators of key public and private agencies involved with the administration of justice, and conducted telephone surveys. Thirteen public hearings were held at different locations around the state. Written testimony was also taken.

A judicial survey aimed at capturing perceptions of bias in the justice system was undertaken. Of the 340 Superior Court judges attending the Judicial College, nearly 50% returned the questionnaire. The response rate for court administrators attending the Judicial Staff College was 61%.

RECOMMENDATIONS

The Supreme Court should require that all rules and directives regarding bail be reviewed and revised in order to promulgate procedures to be applied uniformly statewide.

The Chief Justice should consider approaching the Attorney General to explore the possibility of jointly sponsoring an empirical analysis of recent New Jersey samples of bail and sentencing outcomes, controlling for key factors that influence the outcomes of these decisions, examining the possibility of cumulative discrimination effects over the sequence of decisions from arrest through sentencing, and determining the degree to which discrimination occurs at each of those decision points.

REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, EXECUTIVE SUMMARY, APR. 1991

The Commission was formed on January 21, 1988 by Chief Judge Sol Wachtler. The mandate of the Commission was to examine the courtroom treatment of minorities, review the representation of minorities in nonjudicial positions within the courts, and review the selection processes for judges.

The Commission was created after members of the Coalition of Blacks in the Courts met with the Chief Justice in 1987 to discuss both the despair felt by judges, nonjudicial officers and litigants regarding the treatment of Blacks in the

courts and the underrepresentation of Blacks within the judiciary and the legal profession.

The Commission held four public hearings throughout New York state. Additionally, the Commission held a series of public meetings in each county with a minority population of at least 10%, met with most judges in the state, met with court administrators, and met with leaders of various bar and community associations.

The Commission conducted an attorney survey. Of the 840 attorneys surveyed, 81% responded. The Commission also conducted a survey of the 1,129 judges in the State. The response rate was 57%.

RECOMMENDATIONS

Judges should review their bail and sentencing decisions to ensure that they are fair and not influenced by racial or ethnic stereotypes.

Sentencing statistics concerning the race of victim, defendant and complainant should be maintained along with case outcome and should be published by the Unified Court System in cooperation with the New York State Division of Criminal Justice Services.

Judges should exercise heightened scrutiny to ensure that peremptory challenges are not used improperly in the voir dire process.

The Commission on Judicial Conduct should give complaints of racial bias high priority and keep records of its investigations and disposition of charges in a manner permitting analysis of whether there were any patterns of racial or ethnic discrimination.

**OREGON SUPREME COURT TASK FORCE, REPORT
ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL
SYSTEM, MAY 1994**

The Oregon Supreme Court Task Force was established by the Oregon Supreme Court on February 21, 1992. The task force was created to identify problems faced by racial and ethnic minorities in the judicial system and to propose a course of action to address the problems and concerns.

The Task Force gathered information from testimony at nine public hearings throughout the state. Additionally, 7,525 persons who use the court system were surveyed regarding issues of race and ethnicity in the Oregon court system. Surveys were sent to 5,438 judges, court personnel, and attorneys. The response rate was 40%. In addition to the extensive survey research, prior research, and written comments submitted to the task force were analyzed.

FINDINGS

Peremptory challenges, eliminating individuals from serving on juries, are used solely because of the race or ethnic background of prospective jurors.

In the criminal justice area, the evidence suggests that, as compared to similarly situated nonminorities:

- minorities are more likely to be arrested,
- minorities are more likely to be charged,
- minorities are less likely to be released on bail,
- minorities are more likely to be convicted,
- minorities are less likely to be put on probation,
- minorities are more likely to be incarcerated.

In the juvenile justice system:

- minorities are more likely to be arrested,
- minorities are more likely to be charged with delinquent acts,
- minorities are more likely to be removed from their

- family's care and custody,
- minorities are more likely to be remanded for trial as adults,
- minorities are more likely to be found guilty of delinquent acts,
- minorities are more likely to be incarcerated,
- minorities lack experts sensitive to the cultural differences of minorities.

RECOMMENDATIONS

District attorneys should be required to collect and report to the Criminal Justice Council data on the variable of race in all charging decisions.

The legislature should direct the Criminal Justice Council to develop uniform charging standards to be used by all prosecutors in Oregon. The uniform standards should be sufficiently detailed to provide meaningful limits on prosecutorial discretion and to enable judicial review. The Criminal Justice Council should be directed to report biannually to the legislature on the implementation of the standards.

The Chief Justice should require trial judges, in rendering pretrial release decisions, to use uniform forms that include the race of defendants.

The legislature should direct the Criminal Justice Council to study and report the extent to which the race of a defendant affects the outcome of a pretrial release decision, either in the decision whether to release on personal recognizance or in the conditions of release.

Because of the immense help that its statistics have been to this task force, and because it is imperative that such statistics be available in the future, the Criminal Justice

Council should continue to study and report on racial disparities in sentencing.

WASHINGTON STATE MINORITY AND JUSTICE TASK FORCE, SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS, DEC. 19, 1990

The Task Force was established in 1987 pursuant to legislation which sought to improve the treatment of racial and ethnic minorities in Washington courts. The Task Force held public forums around the state in 1988 and undertook research studies.

The Washington Supreme Court created the Minority and Justice Commission in October 1990 in acknowledgment of the importance of the continuing need to determine whether racial, ethnic and cultural bias exists in the state court system and, when it exists, to recommend appropriate action to overcome it. The Commission's purpose was to continue the work of its predecessor, the Task Force, by implementing the Task Force Recommendations.

The data for the Commission's study on race and ethnic disparities in the prosecution of felony cases in King County came from three sources: (1) an automated database used by the Office of the King County Prosecuting Attorney; (2) case files for a sample of approximately 500 felony cases filed with the King County Superior Court during 1994; and (3) personal interviews with 15 King County deputy prosecuting attorneys.

FINDINGS:

The filing of felony charges by the King County Prosecutor's Office varies by the type of offense and by the race of the offender . . . White offenders were the least likely to be charged (60%), compared to 65% of all minority offenders.

First, the effect of race, particularly African American, on bail was significant in most analyses...Second, there were significant differences in the amount of confinement recommended for Black offenders and White offenders, and deputy prosecutors were less likely to recommend an alternative sentence conversion for Black offenders.

[C]ontrolling for legal factors, African Americans tend to receive higher sentences than Whites and are less likely to be provided an alternative sentence conversion.

CALIFORNIA JUDICIAL COUNCIL ADVISORY COMMITTEE ON RACIAL AND ETHNIC BIAS IN THE COURTS, FAIRNESS IN THE CALIFORNIA STATE COURTS.

The Advisory Committee on Racial and Ethnic Bias in the State Courts was appointed in 1991 by Chief Justice Malcolm Lucas.

The Committee conducted 13 days of public hearings to ascertain public perceptions of fairness in the judicial system. After the hearings, a survey was completed in order to verify the extent to which the concerns expressed in the public hearings were shared by the general public, attorneys, and court personnel. The survey of the general public consisted of a random sample of 1,338 people. Approximately 2,070 written questionnaires were mailed to all judicial officers and top administrators of the courts. Another 2,000 questionnaires were mailed to minority and non-minority attorneys.

represented parties and have participated as *amicus curiae* in this Court and in the lower state and federal courts.

The Fund has a long-standing concern with the influence of racial discrimination on the criminal justice system. It has raised jury discrimination claims in appeals from criminal convictions,² pioneered in the affirmative use of civil actions to end jury discrimination,³ represented the defendant in *Swain v. Alabama*, 380 U.S. 202 (1965), and filed an *amicus* brief in *Batson v. Kentucky*, 476 U.S. 79 (1986). The Fund has also participated in a number of cases involving the influence of race upon the administration of capital punishment.⁴

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Northern California, the ACLU of Southern California, and the ACLU of San Diego and Imperial Counties, are its affiliates in the state of California where this action arose.

Since its founding in 1920, the ACLU has been particularly concerned with combatting the problems of racial discrimination in the criminal justice system. For example, the ACLU played an important role in overturning the infamous Scottsboro convictions in *Powell v. Alabama*, 287 U.S. 45 (1932). More importantly, the ACLU has been deeply involved in the effort to eliminate the discriminatory use of peremptory challenges. See e.g. *Batson v. Kentucky*, *supra*.

² E.g. *Alexander v. Louisiana*, 405 U.S. 625 (1972).

³ *Carter v. Jury Commission*, 396 U.S. 320 (1970); *Turner v. Fouche*, 396 U.S. 346 (1970).

⁴ *Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977); *McCleskey v. Kemp*, 481 U.S. 279 (1987).

This case once again brings the issue of racial discrimination in the criminal justice system to the forefront. As this Court has previously recognized, even the appearance of discrimination has a corrosive effect on public confidence in the administration of justice. The actual existence of discrimination is obviously incompatible with our most basic notions of due process and equal protection. The proper resolution of this case is, therefore, of critical importance to the Fund, and to the ACLU and its members.

SUMMARY OF ARGUMENT

The case calls upon the Court to fashion a discovery rule for selective prosecution claims.

Despite the Court's unceasing efforts to purge the administration of justice of racial discrimination, comprehensive contemporaneous studies by the state and federal courts show that racial bias continues to influence decision-making in the criminal justice process. Elimination of bias from judicial proceedings requires that courts take affirmative steps to identify instances in which bias may influence discretionary decision-making and to prevent it from doing so. Information relevant to bias and decision-making must be collected, maintained, and disclosed when necessary to determine whether a decision is bias-influenced. Today, evidence relevant to determining whether decisions of prosecutors are influenced by race is often maintained only by the prosecutor.

These studies as well as other sources show that discretionary decisions by prosecutors in drug prosecutions may sometimes be influenced by racial bias. Courts must be prepared to explore such matters thoroughly whenever a colorable basis for such a claim is presented.

The government's view that discovery is not permissible until the defendant makes a substantial threshold showing of selective prosecution ignores these realities. Such a rule overprotects the government's interest in being free of such discovery, is based upon a false view that

evidence tending to show selective prosecution is generally and reasonably available elsewhere, and would, if adopted, impose a crippling burden of production upon citizens facing criminal charges who are often indigent.

The district court utilized the correct approach in this case. Discovery of non-privileged data and charging criteria was ordered only after respondents presented credible evidence suggesting that only African Americans are prosecuted in federal court for sales of cocaine base whereas large numbers of non-blacks are prosecuted in state court where sentences are significantly lighter, and only after the district court gave careful, deliberate consideration to the government's rebuttal evidence. Such issues are best left to the district courts, and the judge in this case clearly did not abuse her discretion.

ARGUMENT

I. CONTEMPORARY EVIDENCE REVEALS THAT RACIAL BIAS CONTINUES TO INFLUENCE THE EXERCISE OF DISCRETIONARY ACTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE

A. Comprehensive studies initiated by state and federal courts show that racial bias continues to influence decision-making in the criminal justice system

During the past decade, numerous state and federal courts established task forces and charged them with appraising the treatment of racial and ethnic minorities in the courts, ascertaining public perceptions of the fairness of the judicial system, and making recommendations on reforms and identifying the response necessary to eliminate the perception and reality of race-based partiality. The unpleasant and consistent conclusion each has reached is that "inequality, disparate treatment, and injustice remain

hallmarks" of the criminal justice system.⁵ We report important findings that are relevant to the question presented.

1. Race continues to influence discretionary decisionmaking within the criminal justice system

After exhaustive research and analysis of copious data⁶, the court appointed task forces throughout the country confirmed the continued influence of racial bias at all stages of the criminal justice process. Distressingly, racial bias, both overt and unconscious, continues to cause an alarming number of law enforcement actors -- police, prosecutors, and judges -- to treat minorities differently and more harshly than similarly situated whites. Race continues to exercise influence wherever discretion is exercised, whether it be at the arrest,⁷ charging, bail,⁸ jury selection,⁹

⁵ *New York State Judicial Commission on Minorities, Executive Summary*, p. 1 (April 1991) [hereinafter "New York"].

⁶For a description of each study's methodology, see Appendix A.

⁷The Florida Supreme Court Racial and Ethnic Bias Study Commission's findings are typical. The Commission found that "An overwhelming majority of those interviewed (including, significantly, law enforcement officials) believed that minorities are treated differently from and more harshly than non-minorities at the arrest stage. [M]inority juveniles are more likely to be formally arrested than similarly situated white juveniles." Florida Supreme Court Racial and Ethnic Bias Study Commission, *Where the Injured Fly for Justice*, Dec. 11, 1990, at 62 [hereinafter *Florida I*]. The New Jersey Supreme Court Task Force on Minority Concerns concluded that there was significant evidence of discrimination by police who channel minority criminal defendants to the court system. New Jersey Supreme Court Task Force on Minority Concerns, *Final Report*, June 1992, at 132 [hereinafter *New Jersey*]; see also, e.g., The Washington State Minority and Justice Commission, *Racial and Ethnic Disparities in the Prosecution of Felony Cases in King County-Final Report*, Nov. 1995, at 52 [hereinafter *Washington*] (deputy prosecuting attorneys

or sentencing stage. One report summarized:

In short, the reality is that African-American[s] . . . are being treated differently at several stages of the . . . justice system. When the object is punishment -- detention, formal adjudication, or commitment -- minorities get more; when what is being handed out is informal processing or diversion, minorit[ies] get less. This differential treatment results, at least in part, from racial and ethnic bias on the part of enough individual police officers, . . . prosecutors, and judges to make the system operate as if it intended to discriminate against non-whites.¹⁰

report that predominantly minority areas are targeted by the police for proactive drug stings); Oregon Supreme Court Task Force, *Report on Racial/Ethnic Issues in the Judicial System*, May 1994, at 3 [hereinafter *Oregon*].

⁸See, e.g., D.C. Circuit Task Force on Gender, Race and Ethnic Bias, *Draft Final Report*, Jan. 1995, at 215 [hereinafter *D.C. Circuit*]; *New York*, at 38-40; Florida Supreme Court Racial and Ethnic Bias Study Commission, *Where the Injured Fly for Justice*, Dec. 11, 1991, at 23 [hereinafter *Florida II*] ("non-White offenders were less likely than Whites, other factors being equal, to have bail set below schedule boundaries"); *New Jersey*, at 133; Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts, *Final Report*, Dec. 1989, at 51 [hereinafter *Michigan*] ("a district judge at a judicial forum indicated that it was sometimes expedient as a matter of political reality to place a higher bond on a minority defendant"); Georgia Supreme Court Commission on Racial and Ethnic Bias in the Court System, *Let Justice Be Done: Equally, Fairly, and Impartially*, Aug. 1995, at 132-136 [hereinafter *Georgia*]; *Oregon*, at 3.

⁹See *Georgia*, at 33; *Michigan*, at 49.

¹⁰*Florida I*, at 59-60.

The cumulative effect of this differential treatment of non-whites at each level of discretionary decisionmaking has repeatedly been determined to be substantial. See e.g., *Iowa*, at 187 ("the combined effect [of racial bias] during processing in the court system is not slight"); *Florida I*, at 73; *Washington*, at 4-5.

2. Racism, both overt and unconscious, affects discretionary charging and sentencing decisions

In particular, state and federal task forces consistently identified that differences in prosecutorial charging decisions could only be accounted for by race.¹¹ For example, Michigan's task force found that racial and ethnic minorities in the Detroit metropolitan area are routinely charged with felonies for certain conduct that, when engaged in by white offenders, results in misdemeanor charges. *Michigan*, at 51. Similarly, the Massachusetts Commission reported that available data disclosed a "disturbing pattern": young black males were more likely to receive terms of incarceration than similarly situated white counterparts. Massachusetts Supreme Judicial Court Commission to Study Racial and Ethnic Bias in the Courts, *Final Report*, Sept. 1994, at 95 [hereinafter *Massachusetts*].

In New York, Blacks and Hispanics were found to be treated more harshly than whites¹², especially in majority-white counties. For example, in suburban, majority-white Westchester County, minority felony defendants with prior criminal records had a 52% chance of being incarcerated

¹¹See, e.g., State of Iowa Equality in the Courts Task Force, *Final Report*, Feb. 1993, at 174, 179-80, 187 [hereinafter *Iowa*]. *Florida I*, 66-67; *Washington*, at 5, 51.

¹²For example, in misdemeanor cases, whites were assessed fines while Blacks and Hispanics with similar backgrounds were sentenced to jail for similar misdemeanors. *New York*, at 41.

while similarly situated white felony defendants had only a 39% chance of being incarcerated. *New York*, at 41, citing New York State Division of Criminal Justice Services study. See also *Washington*, at 54 ("Longer periods of confinement were recommended for Black offenders than for White offenders, even after we took into account legally relevant factors").

This disparate treatment has been acknowledged by prosecutors and judges as well. For example, a federal judge testified to the influence of unconscious racism on discretionary charging and sentencing decisions in the following terms:

I'm not suggesting deliberate discrimination by the U.S. Attorney, but I have seen throughout my years as a judge a different view brought to cases where a prosecutor may feel there is not something worth saving I think there is perhaps a natural tendency to think with the white male, "Here's a young person with no prior problems with the law. We don't want to destroy his future." There may not be the same feeling for the black male, just a sense that he is not going to go far anyway. I don't think this is deliberate discrimination, but it results in more of a tendency to find a way out for the white male than the black male.¹³

To similar effect were the observations of a state judge:

[A]gain, it's this institutional—it's the subtle, it's the unconscious kind of racism. There was an incident that happened in Palm Springs following a sentencing seminar sponsored [by] either CJA or CJER. And judges were in the pool relaxing afterwards, and there was a conversation going on about sentencing and talking about what we had discussed earlier. And among two of the judges, they said, well, they

¹³ *D.C. Circuit*, at 165.

had decided that for Blacks, the sentencing option of jail and longer jail sentences was the more appropriate sentence than for Whites or for Asians, because everybody knew there wasn't any social stigma attached to Blacks going to jail, because, first of all, they live in communities where everybody was Black, and so they didn't have any reason to be embarrassed, so if you just gave a little jail time, it would be all right.¹⁴

Moreover, a District of Columbia federal prosecutor opined that disparate treatment occurred less innocently:

I think the judges are less harsh with a white defendant as opposed to a black defendant. A judge will be lenient to a white defendant and when a black man commits the same offense, they will send him away. It is appalling. They may see a white defendant and they connect.¹⁵

That such bias stems from a government actor's unstated and inarticulable intuition that a defendant deserves different treatment because of his race hardly makes it less of an offense to bedrock equal protection principles.

The task forces' sincere efforts at self-scrutiny have consistently yielded this alarming conclusion: that racial bias in the administration of justice is pervasive and persistent and threatens both the appearance and reality of evenhanded justice.

¹⁴ California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts, *1991-1992 Public Hearings*, at 87 (1993).

¹⁵ *D.C. Circuit*, at 162. Another prosecutor told the D.C. Circuit task force, "The judges are predominately a white bunch and they tune into factors that are familiar to them personally." *D.C. Circuit*, at 214.

- B. **Eliminating racial bias, both overt and unconscious, from judicial proceedings requires that courts take specific steps to identify instances in which bias may influence decision-making and to prevent it from doing so**

A second consistent theme of these judicially endorsed reports is also clear: unless courts act more vigilantly, racial bias will never be eradicated from the administration of justice and public confidence will wane further. One task force stated, "[P]ublic confidence in our system of justice must become and remain a priority for each member of that system." *Michigan*, at 23. See also *Massachusetts*, at 4.

Only by acknowledging that bias persists and by taking the necessary steps to deal with it will courts dispel the notion held by some members of the public that the courts are tolerant of race discrimination. Undertaking this challenge is essential because:

Like any relationship, the relationship between the courts and the communities around them needs attention and care to ensure that each party understands and trusts the other. By giving more attention to these relationships, the courts would not only better serve the community, they would also make their own jobs easier by enhancing the community's confidence in the administration of justice.¹⁶

1. **Despite the courts' current efforts to eradicate racial bias, overt and unconscious racism on the part of law enforcement actors persists**

The task forces found that for minorities, overt racism on the part of law enforcement actors is a fact of life.

¹⁶ *D.C. Circuit*, at 5-6.

An instance of such bias helped to bring about the creation of the Massachusetts Commission: In August 1988, during a criminal session of the Suffolk Superior Court, Assistant Attorney General Thomas H. Brewer, an African American, attempted to gain access to a part of the courtroom that he was entitled to enter. However, because of his race, two court officers mistook the Assistant Attorney General for a defendant and physically attempted to bar him from the courtroom.¹⁷

Such incidents by law enforcement actors sadly are not uncommon and were reported to other commissions.¹⁸ Additionally, judges continue to exhibit overt racism in the courtroom. The Oregon task force was disturbed by an incident in which a Mexican-American defendant appeared before a judge on the issue of whether the defendant's diversion program should be revoked for nonpayment of diversion fees. In open court, the judge admonished the defendant as follows:

I'm not going to let him just hold out money. And I know just darn good and well where that money from [his job] went. I'll bet a good part of it went down South, and that's his business, except that he's got this obligation here.

¹⁷Doris Wong, *Shannon Office to Probe Alleged Court Assault*, *The Boston Globe*, Dec. 13, 1988, at 29.

¹⁸For example, an African-American attorney related his experience to the New York task force:

In criminal court in New York County I was grabbed from behind in a chokehold around the throat by a court officer who assumed that I was a defendant approaching too close to [a judge] who had motioned me to approach the bench.

New York, at 88.

Oregon, at 1.

That such brazen, on the record comments are exceptional, however, should not blind courts to the extent that unconscious racism based upon racial stereotypes and cultural misunderstandings also permeates the administration of justice. The Georgia task force noted that "there are incidences of bias which appear to result from unintentional conduct or conduct resulting from a lack of awareness." *Georgia*, at 9. See also, *Oregon*, at 2.

Indeed, the elusiveness of this subtle or even unconscious racism makes it in one respect more problematic than overt racism: without heightened attentiveness, it is likely to go detected in any individual case. As one report put it, "Like the presence of poison in food or certain pollutants in the air, bias in decision-making may not always be readily detectible by the unwary." *Florida I*, at 5.

Ongoing, unchecked racial bias mocks the idea that justice is dispensed equally to all under the law. Not surprisingly, incidents recounted in the reports explain why too many Americans distrust the fairness of our courts. As this Court has repeatedly acknowledged, racial bias fundamentally undermines the integrity of the criminal justice system in violation of the bedrock guarantee of equal treatment embodied in the Fifth and Fourteenth Amendments. See e.g. *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

While existing mechanisms may be relied upon in cases where race discrimination is overt, the compelling evidence cited above require courts to develop appropriate solutions to reach those circumstances in which racism takes more subtle form. The resolution of such problems "will require an extraordinary intellect, unswerving compassion and most importantly, a level of candor that will engender respect for any decision the Court might reach." *New Jersey*, at ii.

The task forces identified tools to deal with the more subtle bias that has been found to infect discretionary decisionmaking: adoption of systems for collection of relevant data necessary for monitoring discretionary decisions, the promulgation of guidelines to channel the exercise of discretion to avoid bias, and development of new remedies for addressing bias. As the Florida commission found, there is a "need for fundamental reforms to eradicate the stain of racism from the garments of justice." *Florida II*, at viii.

2. Adequate information must be collected, maintained and disclosed when necessary in order to determine the existence or non-occurrence of bias-influenced decisionmaking

During the course of their investigations, the task forces discovered that a major roadblock to determining whether bias existed in the criminal justice system was the difficulty of gathering the necessary data. They were hampered by the lack of systematic institutional mechanisms for compiling bias data and were often forced to conduct their own studies, which usually required considerable financial resources. See, e.g., *Iowa*, at 188; *Florida II*, at 60. Much of the information analyzed by the court task forces came from District Attorneys' Offices.¹⁹

Since prosecutors' offices already possess access to the information needed to make a comprehensive study of bias, the task forces concluded that these offices should assume the responsibility for gathering much of the

¹⁹Law enforcement officers consulted cooperatively with the task forces in a variety of ways, including releasing an array of information about their internal practices. See *Florida II*, at 46; *Massachusetts*, at 93-4 (District Attorneys' offices provided the most useful data on sentencing disparities because their files were the most complete). The cooperation of the prosecutors' offices was essential because relevant information was not always available to the public. See *D.C. Circuit*, at 200.

information crucial to monitoring bias. Data regarding exercise of prosecutorial discretion would then be readily available.²⁰

The task forces also recommended that bias data be made routinely available to all concerned, including the public, *see Iowa*, at 190 (any patterns of racially associated disparities should be publicly disseminated, and specifically brought to the attention of the Districts where the disparities occurred); *New York*, at 43 (sentencing statistics concerning the race of the victim, defendant and complainant along with case outcome should be maintained and published by the Unified Court System in cooperation with the New York State Department of Criminal Justice Services), and that periodic studies to determine the existence or influence of racial bias be undertaken. *See Massachusetts*, at 24; *Georgia*, at 165; *New Jersey*, at 133.

3. Based upon the availability of such reliable information, the exercise of discretion can be monitored so as to identify and eliminate discriminatory actions in the criminal justice process

Reliable data must be disclosed when necessary to avoid the influence of bias because "[t]he need for discretion, while compelling, must be balanced against the potential for abuse. The need to ensure that the charging decision is free from racial and ethnic bias must be taken into account." *Oregon*, at 35. *See also Florida I*, at 77. Only

²⁰*See, e.g., Iowa*, at 190 (county attorney offices should keep records of the charges on initial arrest, the charges ultimately filed, the arrests they chose not to prosecute, the reasons they chose not to prosecute, and the race and gender of the alleged perpetrators); *Massachusetts*, at 24, 95 (District Attorney's office should be responsible for collecting data on case processing between the police, the department of probation, and other law enforcement agencies); *Oregon*, at 35 ("District attorneys should be required to collect and report to the Criminal Justice Council data on the variable of race in all charging decisions").

by having data available will it be possible to monitor effectively the influence of bias in the discharge of the official responsibilities of the police, the prosecution and the judiciary. *See Massachusetts*, at 24.

Traditionally, prosecutorial discretion has been regarded not only as broad but as virtually immune from external scrutiny based upon the assumption that adequate internal mechanisms are in place to deal with overt discrimination. Time and again, the task forces concluded that the traditional approach, leaving the exercise of discretion to internal monitoring only, was inadequate to prevent subtle forms of discrimination.

The task forces concluded that new monitoring mechanisms are sorely needed,²¹ and that the monitoring of discretionary decisionmaking encourages awareness of racial bias, thereby helping to eradicate it.²²

The task forces also concluded that traditional remedies for race discrimination are often ineffective. For example, many concluded that trial courts too often fail to police the discriminatory exercise of peremptory challenges by prosecutors. Thus, one task force recommends allowing appellate courts to review *Batson* issues *de novo*. *Georgia*, at 33. Similarly, the Michigan task force expressed alarm after it was unable to find even one reported Michigan decision in which a *Batson* claim was found meritorious. *Michigan*,

²¹These include promulgating regulations to channel discretion, conditioning funding to prosecutor's offices on the requirement that their offices eliminate the discriminatory effects of their decisions, requiring the submission of reports detailing discretionary practices for review, and creating a state-wide database which includes information about sentencing and charging decisions for outside monitoring. *See Oregon*, at 35, 44; *Georgia*, at 31; *Florida I*, at 66-67, 76; *Florida II*, at 44; *Massachusetts*, at 97; *New York*, at 43; *Iowa*, at 188; *Michigan*, at 55.

²²*See Florida II*, at 43-44; *Georgia*, at 166-67.

at 49. Thus, it recommended that trial judges be encouraged to implement the *Batson* standard on their own initiative in any jury selection process in which peremptory challenges appear to be racially motivated. *Id.* See also *New York*, at 59 ("Judges should exercise heightened scrutiny to ensure that peremptory challenges are not used improperly").

II. THE DISCRETIONARY DECISIONS OF FEDERAL PROSECUTORS WHETHER TO EXERT FEDERAL CRIMINAL JURISDICTION OVER NARCOTICS OFFENSES MUST BE SUBJECT TO EFFECTIVE MONITORING TO ENSURE THAT RACIAL BIAS DOES NOT INFLUENCE THEM

Prosecutorial discretion contributes to the widening gulf between juvenile and adult African-Americans' and other offenders' incarceration rates. While "the total number of white juveniles brought to court on drug charges in 1990 exceeded the total number of blacks by 6,300 . . . , a far greater number of white youths were sent home without being tried, were released to drug counseling programs, or were placed on probation. Consequently, 2,200 more blacks than whites ended up on correctional facilities."²³ Figures for adult crack and cocaine

²³Ron Harris, *Hand of Punishment Falls Heavily on Black Youth*, L.A. Times, August 24, 1993 at 7 [hereinafter *Punishment*]. Other data shows that drug abuse is centered largely in the white community. African-Americans make up 12% of the U.S. population, 13% of all monthly drug users, but represent 35% of those arrested for drug possession, 55% of those convicted of drug possession, and 74% of those sentenced to prison for drug possession. The Sentencing Project, *Young Black Americans and the Criminal Justice System: Five Years Later*, Oct. 1995. See also Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America*, 1995, at 49. ("Blacks are arrested and confined in numbers grossly out of line with their use or sale of drugs").

prosecutions are similar.²⁴

A recent survey of prosecutions for crack cocaine offenses conducted by the Los Angeles Times revealed that not a single white offender had been convicted of a crack cocaine offense in the federal courts serving the Los Angeles metropolitan area since 1986, despite the fact that whites comprise a majority of crack users. Dan Weikel, *War on Crack Targets Minorities Over Whites*, L.A. Times, May 21, 1995, quoted in The Sentencing Project, at 10 (1995). Moreover, according to a study by Richard Berk, between 1990 and 1992, over 200 white crack dealers were prosecuted by the state authorities in Los Angeles, a period during which the U.S. Attorney's office prosecuted not one white defendant for crack. Richard Berk, *Preliminary Data on Race and Crack Charging Practices in Los Angeles*, 6 Fed. Sentencing Rep. 36 (1993).

Just as the existence of a pattern of employing peremptory challenges with the result of removing Black or other minority jurors from panels suggests the possibility that this aspect of prosecutorial discretion may be influenced by racial bias, and requires the carefully delineated judicial remedy created by this Court in *Batson*, so too do the data summarized above support -- indeed compel -- the conclusion that a similar judicial remedy must be available to preserve the integrity of the federal criminal justice system. Unless the potential for discriminatory decision-making is addressed, public support for and confidence in federal criminal procedures will be eroded by the suspicion

²⁴In 1989, former Drug Czar William Bennett described the typical cocaine user as a "white, male, high school graduate, employed full time and living in a small metropolitan area or suburb." Sam Meddis, *Whites, Not Blacks, At The Core of Drug Crisis*, USA Today, Dec. 20, 1989, at 11A. The Justice Department offered the following profile of crack users in the United States during 1991: 49.9% of crack users are White, 35.9% are Black, and 14.2% are Hispanic. U.S. Department of Justice, Bureau of Justice Statistics, *Drugs, Crime, and the Justice System*, Dec. 1992, at 28.

that drug laws generally, and the "cocaine base" laws specifically, are being administered in a racially discriminatory manner. That is surely the view of a growing number of law enforcement officials²⁵ and judges²⁶ who have been on the front lines throughout the "War on Drugs."

²⁵ Former Atlanta Police Chief Eldrin Bell remarked recently:

I wonder if because it is blacks . . . who are going to jail in massive numbers, whether we . . . care as much? If we started to put white America in jail at the same rate that we're putting black America in jail, I wonder whether our collective feelings would be the same, or would we be putting pressure on the president and our elected officials not to lock up America, but to save America?

Nkechi Taifa, *Laying Down the Law, Race by Race*, Legal Times, Oct. 10, 1994, at S36.

Steven Madison, an Assistant U.S. Attorney in Los Angeles, admits that minorities are targeted in crack cocaine arrests and prosecutions. He stated that while crack is sold and used in middle and upper class communities, law enforcement focuses on crack cocaine dealers in minority neighborhoods because, as a result of limited resources, "we went where the brush fires were." Sam Meddis, *supra* n.24, at 11A.

²⁶ A federal judge remarked recently:

As sad as it may sound, and as much as the Court feels discomfort in pointing it out, if young white males were being incarcerated at the same rate as young black males, the statute would have been amended long ago.

United States v. Clary, 846 F. Supp. 768, 792 (E.D. Mo. 1994).

III. THE GOVERNMENT'S VIEW THAT DISCOVERY IS NOT PERMISSIBLE UNTIL THE DEFENDANT MAKES A SUBSTANTIAL THRESHOLD SHOWING OF SELECTIVE PROSECUTION, IF ACCEPTED, WOULD IMPOSE AN UNNECESSARY AND CRIPPLING BURDEN UPON VINDICATION OF EQUAL PROTECTION CLAIMS

Despite the swirling controversy surrounding federal drug prosecutions as well as the contemporary evidence that racial bias continues to influence charging decisions yet is difficult to ferret out, the government seeks a rule which, if adopted, would render it immune from any discovery in nearly all selective prosecution cases, regardless of their merit. The Court should reject this approach because it is based upon a false premise that overprotects the prosecution function and would impose an unrealistic and crippling burden of production upon defendants.

A. The "substantial threshold" rule overprotects the government's interest in preserving broad discretionary prosecution powers.

The government asks the Court to hold that "judicial inquiry into a prosecutor's reasons for bringing a prosecution should not even begin unless there is a substantial and concrete basis for suspecting unconstitutional conduct." U.S. Brief at 19. Two justifications are advanced in support: "[b]y requiring a significant threshold showing, courts may avoid unwarranted and highly intrusive inquiries into a prosecutor's judgment . . . [as well as] prevent the needless diversion of government and judicial resources from the adjudication of the criminal case to the disposition of the selective prosecution motion." *Id.* at 20. Neither justifies such a demanding standard.

To acknowledge that the prosecutor enjoys spacious discretion in deciding whom to prosecute is also to recognize that such power "is the power to control and destroy

people's lives."²⁷ Justice Jackson observed that this broad power of choice held within it the power to abuse "some group of unpopular persons"²⁸ Thus, it is the very breadth of such power that creates the potential for unequal treatment.

The risk of unequal treatment created by standardless discretion is troubling not only as a threat to due process but also in its own right as well. Giving prosecutors the power to invoke or deny punishment at their discretion raises the prospect that society's most fundamental sanctions will be imposed arbitrarily and capriciously and that the least favored members of the community -- racial and ethnic minorities, social outcasts, the poor -- will be treated most harshly.²⁹

Prosecutors are clothed with such broad powers for a noble purpose -- to enable them to seek the "equitable objective of individualized justice" within a system of limited resources.³⁰ But any time the defendant's race enters the calculus, this high purpose is defeated, and the justification for deferential judicial oversight vanishes.

When a citizen makes a colorable showing that race likely influenced the prosecutor's decision to file the pending charge, and claims that she needs access to government files to generate additional proof of invidious discrimination, the Court should require nothing more. Once an honest

²⁷ Bennett L. Gershman, *Prosecutorial Misconduct*, at 4-7 (1993)[hereinafter Gershman].

²⁸ Robert Jackson, *The Federal Prosecutor*, 31 J.Crim.L. & Crim. 3, 5 (1940).

²⁹ James Vorenberg, *Decent Restraint of Prosecutorial Discretion*, 94 Harv. L. Rev. 1521, 1555 (1981)[hereinafter Vorenberg].

³⁰ Gershman, at 4-6.

question is raised about the very legitimacy of the proceeding, it is in the government's interest as much as the defendant's to have the issue resolved conclusively by a neutral magistrate based upon *all* relevant information. Requiring the defendant to show more serves no purpose other than to suggest that only citizens who are particularly nimble at detecting bias enjoy a meaningful opportunity to be heard.

B. Such a rule is based upon a false premise: that the evidence supporting such a claim is generally and reasonably available

Even though "the fate of those accused of crime is determined by prosecutors . . . out of public view -- in the hallways of the courthouse, in the prosecutors' offices, or on the telephone,"³¹ the government argues that the evidence necessary to demonstrate selective prosecution is generally available from sources other than the government's files. U.S. Br. at 26-27. Thus, it is suggested, the defense is not unfairly burdened by a substantial threshold rule.

This has surely not been our experience, nor that of other respected students of the issue. Former federal prosecutor Gershman has written that "proving improper motivation . . . is extremely difficult, and tends to explain the infrequency with which" selective prosecution claims are advanced.³² He believes that discovery should follow once "a colorable entitlement or plausible justification" is demonstrated.³³ Former Department of Justice Official Vorenberg agrees:

. . . the problems involved in proving that a prosecutor had an impermissible motive or personal

³¹ Vorenberg, at 1522.

³² Gershman, at 4-8.

³³ *Id.* at 4-26.4.

animus are enormous. Rarely will a prosecutor explicitly signal improper motives. Unless he does, the defendant must try to draw a clear inference of discrimination by comparing his case with those of persons who were not charged,³⁴

The cases upon which the government relies prove only that in certain unusual circumstances, the defendant may have the ability to present considerable evidence of similarly situated persons who were not prosecuted, as well as some evidence of illicit motive. They hardly make the case for a hard and fast heightened showing in every case. For example, in *United States v. Hoover*, 727 F.2d 387 (5th Cir. 1984), Hoover was one of three of nearly 300 air traffic controllers criminally prosecuted after going out on strike. He was able to show the pool of similarly situated persons easily because they all belonged to the same union and he was their leader. Similarly, in *United States v. Hazel*, 696 F.2d 473 (6th Cir. 1983), the defendant was able to show other similarly situated persons who were not prosecuted because they were members of a tax revolt group to which he belonged.

More often, however, and as in this case, citizens claiming selective prosecution have no special or ready access to the identity of similarly situated persons whom prosecuting authorities chose not to prosecute for similar offenses. And where the basis of the motion is racial discrimination, it is extremely rare for public court files to contain information on the defendant's race. As the task forces found, generation of a data base with the identity of such persons that includes their race and ethnic identity is an enormously time-consuming and expensive proposition when undertaken without the cooperation of the prosecuting attorneys' office. Thus, there is little substance to the

³⁴ Vorenberg, at 1542.

government's assurance that a heightened burden would not foreclose the assertions of such claims.³⁵

C. The "substantial threshold" standard would impose a crippling burden of production

Indeed, the government's argument bears an uncomfortable resemblance to the supporting pillars of the now discredited rule of *Swain v. Alabama*, 380 U.S. 202 (1965): The government insists that prosecutors are presumed to act in good faith and thus should not be subject even to judicial inquiry into illicit motive in the absence of concrete evidence showing otherwise.³⁶ Just as unfettered exercise of the peremptory challenge was good for the cause of justice because it gave the government and defense appropriately broad leeway to remove biased jurors who might escape for-cause removal, the government claims similarly broad prosecutorial discretion best assures that limited resources will be used in the most appropriate cases.³⁷ Courts are ill-equipped, in any event, the argument continues, to review such decisions, and requiring a prosecutor to explain why she is prosecuting a particular case, like having her explain why a peremptory strike was used to eliminate a particular juror, will bring about delay

³⁵ In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States advanced a similar argument in support of retention of the rule of *Swain v. Alabama*. See *Batson v. Kentucky*, No. 84-6263, Brief of United States As Amicus Curiae Supporting Affirmance at 26-27) ("We also find unpersuasive the argument that *Swain* makes it unduly difficult to demonstrate impermissible use of peremptory challenges even when such abusive practices are actually going on. . . . Moreover, public defender's offices and defense counsel's organizations are well situated to collect the requisite statistics.") As it did in *Batson*, the Court should reject such assurances as unrealistic.

³⁶ *Swain*, at 222; U.S. Br. at 16, 19.

³⁷ *Swain*, at 221; U.S. Br. at 17.

and deflect limited resources from the prosecution of law breakers.³⁸

If the Court accepts the government's position, and predicates access to even non-privileged information on defendants' making a robust showing, defendants will be denied meaningful judicial determination of their Equal Protection claims unless they can first pull together a credible composite of selective enforcement from other sources, a task that in many cases will require painstaking review of hundreds of court files, consultation with scores of other attorneys, and pursuing other sources sufficient to generate a body of similarly situated persons not prosecuted.

Such a burden significantly exceeds that which the Court determined, in *Batson v. Kentucky*, 476 U.S. 79, 92 n.17 (1986), to be crippling. Justice Powell described such a burden through examples from lower court cases:

The lower courts have noted the practical difficulties of proving that the State systematically has exercised peremptory challenges to exclude blacks from the jury on account of race. As the Court of Appeals for the Fifth Circuit observed, the defendant would have to investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges. [citation omitted] The court believed this burden to be "most difficult" to meet. In jurisdictions where court records do not reflect the jurors' race and where voir dire proceedings are not transcribed, the burden would be insurmountable. [citation omitted]

We now know that the *Swain* rule was able to shelter for years the intentional discriminatory conduct of certain

³⁸ *Swain*, at 221-22; U.S. Br. at 17.

prosecutors.³⁹ Adoption of a similar standard here would surely generate similar sorry results.

IV. THE DISTRICT COURT'S DISCOVERY ORDER APPROPRIATELY BALANCED EACH PARTY'S LEGITIMATE INTERESTS

The district court ordered discovery in this case only after deliberate and thorough consideration both of the respondent's showing that a significant statistical disparity existed in the race of defendants prosecuted in federal court for crack distribution violations and of the government's explanations for that disparity.

With their motion for discovery, respondents introduced evidence showing a pattern of prosecutions which suggested that race was a significant charging factor. Respondents demonstrated that all 24 crack cocaine cases prosecuted by the government and closed by the Federal Public Defender's Office in 1991 involved black defendants.

At the hearing on the discovery motion, the district judge expressed concern that the "government hasn't offered any explanation at all as to why . . . persons . . . being brought . . . to Federal court for these drug offenses . . . all . . . are black."⁴⁰ The judge offered the government an

³⁹ See e.g., *Jones v. Davis*, 835 F.2d 835 (11th Cir. 1988)(blacks systematically excluded from petit jury service in Mobile County, Alabama over significant period of time by state peremptory strikes); *Love v. Jones*, 923 F.2d 816 (11th Cir. 1991)(blacks systematically excluded from petit jury service in Madison County, Alabama via state peremptory challenges); *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991)(blacks systematically excluded from petit jury service in 8 Georgia counties from 1974-81 via peremptory challenge); *Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995)(blacks systematically excluded from two Arkansas county petit juries from 1970-75 by state's use of peremptory strikes).

⁴⁰Hearing of Sept. 8, 1992, at 8.

opportunity to provide an explanation. However, at the hearing, the assistant United States Attorney was unable to offer any explanation for the disparity, stating, "I can't explain why the public defender's office has only encountered black defendants [in] crack cocaine cases--I would have no explanation for that."⁴¹

In the face of the government's complete inability to explain the statistical disparity, the district judge ordered limited discovery, explaining that "what the Court wants to know is whether or not there is any criteria in deciding which of these cases will be filed in state court versus Federal court and if so, what is that criteria."⁴²

To determine the appropriate scope of the discovery order, the Court took into account the government's assertion that one criteria it used for deciding whether to file in federal rather than state court was the existence of a joint federal/state investigation. Government counsel explained that a joint federal/state investigation is initiated when there is use of a firearm in connection with a narcotics trafficking violation.⁴³ In response to this explanation, the judge directed discovery of four specific non-privileged items: a list of all cases from 1989-1992 in which the government charged both cocaine base offenses and firearms offenses, the race of defendants in each of these cases, whether each case was investigated by federal, state or joint law enforcement authorities, and an explanation of the criteria used by the United States in deciding whether to bring cocaine base cases in federal court.

In its motion for reconsideration of the discovery order, the government offered some of its criteria for prosecuting cases in federal as opposed to state court. As

⁴¹*Id.* at 9.

⁴²*Id.* 26-27

⁴³*Id.* at 20-21.

part of its explanation, the government submitted the declaration of the Chief of the Criminal Complaints Section of the U.S. Attorney's Office which stated that the decision to bring the instant case in federal court was made because the case met the general criteria the government applies to all crack cases. However, the purported general criteria simply described several aspects of the instant case. Counsel for the government later suggested that the official general criteria applied to all crack cases were in fact the same as the criteria present in the instant case.⁴⁴

In response to the government's explanation, respondents argued that a number of the defendants did not satisfy the suggested criteria.⁴⁵ Moreover, respondents introduced evidence demonstrating that white crack cocaine dealers exist and are prosecuted in state court only.⁴⁶

After carefully weighing all the evidence, the district judge found the explanations offered by the government

⁴⁴Government's Motion for Reconsideration, at 24-25; Hearing of Dec. 4, 1992, at 6-8.

⁴⁵Hearing of Dec. 4 1992, at 26

⁴⁶First, the respondents introduced an affidavit of defense attorney Reed, Director of the Criminal Courts Bar Association Indigent Defense Panel. The Indigent Defense Panel handles more state court criminal cases than any other association within Los Angeles County and is composed of over two hundred defense lawyers. Reed attested that as Director of the Indigent Defense Panel, he speaks to many state court judges, prosecutors, and defense attorneys who state that there are many crack cocaine sale cases prosecuted in state court that involve racial groups other than blacks. Hearing of Dec. 4, 1992, at 28-29. Second, defense counsel O'Connor submitted an affidavit stating that she had spoken to Chris Fernandez, the intake coordinator at Impact House in Pasadena, California, who stated that in his experience dealing with the treatment of cocaine base addiction, there are equal numbers of minority and caucasian users and dealers of crack.

inadequate, concluding that the government had failed to make clear the criteria, "if there is any criteria, for bringing this case and others like it in Federal court."⁴⁷ Thus, the court affirmed her discovery order.

The district judge's approach to ordering the limited discovery in this case was cautious, careful and reasonable. First, the judge, confronted with un rebutted evidence of a pattern of racial prosecutions, gave the government a full and fair opportunity to offer an explanation. Only after the government was unable to offer a single explanation for the racial disparity did the judge order limited discovery of nonprivileged relevant information. This order is structured in a way that limits its reach to evidence directly relevant to issues that the government articulated were its criteria for bringing crack cocaine cases in federal as opposed to state court.

The Court should view this order as a sound resolution of this fact-intensive dispute. Because respondents have set forth a colorable showing, and "without discovery, the contention that 'other similarly situated' have not been prosecuted . . . may be impossible to show,"⁴⁸ the lower court judgment should be affirmed.

⁴⁷Hearing of Jan. 5, 1993, at 3.

⁴⁸*United States v. Armstrong*, 48 F.3d 1508, 1521 (9th Cir. 1995)(*en banc*)(Wallace, C.J., concurring).

CONCLUSION

Amici curiae respectfully request that the Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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